Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. [redacted] 59

A. LEO WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

A. LEO WEIL,
In Propria Personam and as Counsel for Petitioners.

(33,188)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 736.

A. LEO WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, DIRECTED TO THAT COURT.

To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:

Your petitioners, A. Leo Weil and Charles M. Thorp, formerly and at the time of the occurrences hereinafter referred to associated as law partners as Weil & Thorp, respectfully show:

The United States Circuit Court of Appeals for the Second Circuit, on the 19th day of December, 1927, affirmed a judgment of the District Court of the United States for the Southern District of New York, entered by that court on March 25, 1926, for the sum of $80,991.08 against petitioners and in favor of respondent, Edward M. Neary, the assignee of Samuel Untermyer, said judgment of the Circuit Court of Appeals being final. Said District Court of the United States entered judgment on the report of the Referee, to whom this action had been referred for hearing, without argument and without briefs, such formal entry of judgment being the practice of that court. A copy of the opinion of the Circuit Court of Appeals (not yet reported) appears on page 263 of the record, duly certified, accompanying this petition. Said opinion also appears in the Appendix at page 142.

Statement of the Matters Involved.

I. This action is at law. The respondent, Edward M. Neary, is the assignee of Samuel Untermyer, a member of the bar of the State of New York. The petitioners, A. Leo Weil and Charles M. Thorp, are members of the bar of the State of Pennsylvania and practice their profession in the city of Pittsburgh. The contract in controversy, averred by respondent in his complaint and amended complaint, and which Weil & Thorp by answer and evidence denied, but which, notwithstanding, was found by the court, and on which judgment in this action was entered, was that Weil & Thorp, who had been appointed general counsel by the

trustees in bankruptcy of the Josiah Van Kirk Thompson estate, which appointment was confirmed by the District Court of the United States for the Western District of Pennsylvania, the court having jurisdiction over said bankruptcy proceedings, after their appointment agreed with Mr. Untermyer, who represented a large number of said bankrupt's creditors, to act not only for the trustees and the estate represented by them, but also to act for Mr. Untermyer and "the interests represented by him" and "under the direction" and "under the general supervision" of Mr. Untermyer (Complaint, R., folios 18, 19, 20, 21, pp. 6, 7; Appendix, pp. 2, 3; Amended Complaint, R., folios 94, 96, 107, 108, pp. 31, 32, 33; Appendix, pp. 21, 22, 23); and that when allowances should be made thereafter by the court to Weil & Thorp, as counsel for the trustees, for their services, only such part thereof should be retained by Weil & Thorp for their legal services as Mr. Untermyer should decide they might keep and the balance thereof should be paid to him (R., folios 7219, 7220, pp. 2406, 2407; Appendix, pp. 132, 133); (in other words, that Weil & Thorp were to be nothing more or less than an *alter ego* for Mr. Untermyer), and that neither the trustees nor the court were informed or knew of this agreement. Weil & Thorp, in this action, in their answer and throughout the proceedings in the different courts, denied such a contract, and further contended "that the contract alleged is illegal, void, and unenforceable, because it is contrary to public policy and good morals and is unprofessional and subversive of the due administra-

tion of justice" (*Marshall vs. Maires*, 203 App. Div., 646; affirmed in 236 N. Y., 516).

This certiorari, if allowed, will bring up this question "of importance which it is in the public interest to have decided by the court of last resort" (*Import Co. vs. Joseph*, 262 U. S., 159). It is to the public interest to keep unpolluted and undefiled the streams of the administration of justice.

2. Josiah Van Kirk Thompson, a resident of Uniontown, Pennsylvania, owning a vast acreage of coal lands, became involved financially in 1915. A large number of Thompson's general creditors employed Samuel Untermyer as attorney to represent them in their claims against Thompson. Thompson's indebtedness, secured and general, amounted to many millions of dollars, his general creditors having claims of over $15,000,000. Mr. Untermyer, representing a committee of creditors, had receivers for the estate of said Thompson appointed by the Court of Common Pleas of Fayette County, Pennsylvania (State court). This receivership, however, was set aside on May 7, 1917, by the Supreme Court of Pennsylvania (R., folios 7185-7188, pp. 2395, 2396; Appendix, pp. 121, 122).

3. Mr. Untermyer thereupon concluded that bankruptcy proceedings should be instituted against Thompson. To that end he explained the facts to Weil, of Weil & Thorp, and retained them to institute such bankruptcy proceedings, under his supervision, upon an agreement as to the amount to be paid them for their services for securing an adjudication in

bankruptcy (R., folios 7187, 7188, pp. 2396, 2397; Appendix, pp. 122, 123). This employment was expressly limited to this service.

4. Involuntary bankruptcy proceedings against Thompson were accordingly instituted in the District Court of the United States for the Western District of Pennsylvania, and Thompson was duly adjudicated a bankrupt on or about September 10, 1917 (R., folio 7190, p. 2397; Appendix, p. 123).

5. Trustees for the bankrupt estate were duly appointed and confirmed by the court (R., folio 7143, p. 2381; Appendix, p. 107).

6. *The said trustees thereupon duly designated, and the district court ratified and confirmed the designation of Weil & Thorp as general counsel for the said trustees, upon the petitioners' certificate in writing, required by Rule 5 of said court (hereinafter quoted), that they did not represent any interests which would be in any way antagonistic or adverse to the event they were so employed* (R., folio 7143, p. 2381; Appendix, p. 107).

The Referee so found, but the fact that Weil & Thorp had been employed for the specific purpose only of procuring the adjudication in bankruptcy of Thompson, and had fully performed the purpose of their employment when they were appointed by the trustees and the court general counsel for the trustees (a fact of fundamental importance), was overlooked or disregarded by the Referee in his decision and by the Circuit Court of Appeals in its decision. By their

employment as general counsel to the trustees a new relation was created of Weil & Thorp to this estate. They were thereafter the general counsel for the trustees and the bankrupt estate, duly appointed, qualified and of record, and subject to the duties and obligations and bound by the restraints and limitations as such. They were from that time on officers of the court, and not, and could not be, the agents and associate attorneys of Mr. Untermyer, the attorney of the creditors' committee, as he claims in this action. The petitioners could no longer represent Mr. Untermyer and his creditor clients, which they had done and it was proper to do, in the institution of the bankruptcy proceedings.

7. Weil & Thorp, prior to their appointment as general counsel by the district court, filed their certificate, as required by Rule 5 of that court. They had completed the service for which they had been employed by Mr. Untermyer, namely, they had secured the adjudication as a bankrupt of Mr. Thompson. Rule 5 is as follows:

> "Attorney for the Estate and His Duties.—Unless specially authorized by the court, receivers and trustees in bankruptcy shall not retain as their attorney the attorney of the bankrupt, of the petitioning creditors, of the person applying for the appointment of a receiver, or of any creditor, and trustees shall not retain as their attorney any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies."

This rule was in full force and effect in said court during the whole administration of the Thompson estate and still is in force (R., folios 7143, 7146, pp. 2381, 2382; Appendix, pp. 107, 108).

8. Mr. Untermyer was not appointed counsel by the trustees, did not file a certificate with the court, as required by said Rule 5, and was not in any way confirmed or recognized by the court as counsel for the trustees. He could not have complied with said Rule 5, as he admittedly represented a large majority of the general creditors. The trustees and the court had no knowledge or intimation that he claimed or pretended to be associated with or to control and direct the trustees' general counsel, Weil & Thorp.

9. Weil & Thorp, pursuant to their appointment, represented the trustees in contesting disputed claims, some of which were filed by Mr. Untermyer through his creditors' committee, and effected sales of the bankrupt's numerous properties. The proceedings in the district court were involved and cumbersome and required a large amount of legal services. The said district court from time to time, with complimentary allusions to the valuable and able services rendered by Weil & Thorp, allowed them fees for services, upon their petitions.

10. Subsequently, about June, 1921, Edward M. Neary, Mr. Untermyer's assignee, brought his action in law here complained of against petitioners. The averments of said complaints are as follows:

> "Third. The plaintiff's assignor, acting under instructions of the creditors by whom he had

been retained and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. To that end he informed the defendants on his plans in that regard and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of five thousand dollars ($5,000)."

(Original Complaint, R., folio 17, p. 6; Appendix, p. 2.)

Paragraph third of the Amended Complaint (R., folio 32, p. 31; Appendix, p. 21, is identical.)

"Fourth. Upon the understanding and agreement aforesaid bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and thereupon such proceedings were had that on or about September 10, 1917, the said Thompson was duly adjudicated a bankrupt and trustees of his estate were duly appointed and the administration thereof proceeded, *the defendants herein acting for plaintiff's assignor and the interests represented by him.*"

(Original Complaint, R., folio 18, p. 6; Appendix, p. 2.)

Paragraph fourth of the Amended Complaint (R., folios 93, 94, pp. 31, 32; Appendix, p. 22, is identical.)

> "Fifth. In the course of the administration of the estate of the said Thompson various complications arose which prolonged the period of administration beyond that contemplated at the time of the institution of the aforesaid bankruptcy proceedings and which rendered it necessary for the defendants to perform more extensive and laborious services than it was originally believed to be necessary in the administration of the said estate in bankruptcy. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that the compensation of the latter for services in said bankruptcy proceedings was not to be limited to the sum of $5,000, as theretofore stipulated, and in lieu of the compensation originally stipulated *it was agreed that the defendants were to receive for the services rendered by them, out of such allowance as should eventually be made by the court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him.*"
>
> (Original Complaint, R., folios 20, 21, p. 7. Appendix, p. 3.)

> "Fifth. In the course of the administration of the estate of the said Thompson, various complications arose which prolonged the period of the administration of the estate beyond that contemplated at the time of the institution of

the aforesaid bankruptcy proceedings, and which rendered it necessary for the defendants and the plaintiff's assignor and the firm of lawyers with which he was and is associated together, to perform more extensive and laborious services than it was originally believed to be necessary for the defendants to perform in the administration of the said estate in bankruptcy. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that the plaintiff's assignor, and the firm with which he was associated, should, together, perform such services, and that the compensation of the defendants for services in said bankruptcy proceedings was not to be limited to the sum of five thousand dollars ($5,000), as theretofore stipulated, and in lieu of the compensation originally stipulated, *it was agreed that the plaintiff's assignor and the firm of lawyers with which he was associated should collaborate with the defendants under the direction of the former in the performance of such services; and that the defendants were to receive for the services rendered by them, out of such allowance as should eventually be made by the court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him.*"

(Amended Complaint, R., folios 95, 96, p. 32; Appendix, p. 22.)

"Sixth. Pursuant to such arrangement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the*

general supervision of plaintiff's assignor, for which an allowance was, on or about September 20, 1920, made to them in said proceedings by the District Court of the United States for the Western District of Pennsylvania, to be paid out of the estate of the bankrupt, of the sum of one hundred and forty thousand dollars ($140,000) in payment for the services rendered by them in said proceedings, and on or about November 15, 1920, said sum of $140,000 was paid to the defendants by the trustees in bankruptcy of the said Thompson."

(Original Complaint, R., folios 21, 22, pp. 7, 8; Appendix, pp. 3, 4.)

"SIXTH. Pursuant to such arrangement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision of plaintiff's assignor*, and with the active aid of the latter and of the firm with which he was associated, for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918; July 2, 1919, and July 18, 1919, in the total sum of thirty thousand five hundred dollars ($30,500); on or about June 1, 1920, in the sum of forty-five thousand three hundred and sixty-six dollars and sixty-six cents ($45,366.66); on or about October 27, 1920, in the sum of sixty-eight thousand and ninety three dollars and thirty-two cents ($68,093.32); on or about November 30, 1920, in the sum of twenty-one thousand dollars ($21,000), and on or about May 10, 1924, in the sum of twenty-three thou-

sand three hundred and thirty-three dollars and thirty-one cents ($23,333.31), amounting to the total sum of one hundred and eighty-eight thousand and two hundred and ninety-three dollars and twenty-nine cents ($188,293.29), to be paid out of the estate of the bankrupt in payment for the services rendered by the defendants in said proceedings, and on or about the dates hereinbefore set forth payments were received by the defendants in the amounts above set forth, together aggregating said sum of $188,293.29, which were paid to the defendants by the trustees in bankruptcy of the said Thompson. A substantial part of the services for which said allowances were made was performed by the plaintiff's assignor and by the said firm with which he was and is associated."

(Amended Complaint, R., folios 108, 109, p. 33; Appendix, p. 23.)

"SEVENTH. On being informed of such payment to the defendants, plaintiff's assignor, recognizing the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, *determined that a fair and reasonable division of the said sum of $140,000 paid to the defendants as aforesaid was that the defendants should retain* sixty per cent. or eighty-four thousand dollars ($84,000), of the said sum, and that the remaining forty per cent. or fifty-six thousand dollars ($56,000), were to be paid to him, and informed the defendants of his determination with respect to such division."

(Original Complaint, R., folio 24, p. 8; Appendix, p. 4.)

"Eighth. On being informed of such payments to the defendants, plaintiff's assignor, recognizing the aforesaid agreement and the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, determined that a fair and reasonable division of the said sum of $188,293.29 paid to the defendants as aforesaid, and of any further sums to be allowed the defendants in said proceedings, was that the defendants should retain sixty per cent (60%) of the said sums received by them and of any further sums allowed them in said proceedings, and that the remaining forty per cent (40%) was to be paid to him, and informed the defendants of his determination with respect to such division."

(Amended Complaint, R., folio 102, p. 34; Appendix, p. 24.)

(The italics in the above paragraphs are ours.)

The amended complaint was filed after the evidence was in. The plaintiff accordingly had every opportunity to know his case. Quotations have been made from both complaints to show that the above statement of the contract is not overstated.

The original and amended complaints contain not a syllable of explanation which would take this case out of the general rule prohibiting contracts between counsel representing hostile interests, or that might become hostile; nor do they contain any allegations that either the trustees or the court were informed or had any knowledge of the alleged agreement.

The referee (R., folios 6952-6970, pp. 2318-2324; Appendix, pp. 66-72) reviews the averments in the complaint, quotes from the same extensively, also the denials of the answer, and concludes (R., folio 6970, p. 2324; Appendix, p. 72):

> "The referee has come to the conclusion that a contract, substantially as alleged by the plaintiff, did exist."

The referee approached the legal objections to this alleged contract from the wrong point of view, and this is in large measure to blame for his erroneous conclusion. Said he (R., folio 7026, p. 2342; Appendix, p. 90):

> ". . . . the referee should not lightly hold an agreement between the parties to be illegal or against public policy which is capable of a construction which would make it consistent with the law and valid."

While this is true as to most contracts, it is not true of contracts that involve and affect the administration of justice and which have a tendency to pollute and contaminate its streams; nor is it true of contracts which involve an alleged agreement between the attorney for trustees in bankruptcy, appointed by the court, on the one side, and one representing a committee of creditors, whose interests may or may not become adverse, on the other. The referee found the agreement to be valid, and gave judgment for the plaintiff, which judgment was affirmed by the district court *pro forma*, and again affirmed by the United States Circuit Court

of Appeals for the Second Circuit. It is this judgment your petitioners seek, by this application for writ of certiorari, to have this Honorable Court review.

11. Your petitioners thus have shown that Mr. Untermyer, although not appointed by the trustees as counsel, nor ratified nor confirmed by the court, as by Rule 5 of said court required, by his own allegations entered into an agreement with Weil & Thorp, as general counsel of the trustees, whereby said duly appointed counsel were required to proceed "under the general supervision of plaintiff's assignor" (R., folios 21, 108, pp. 7, 33; Appendix, pp. 3, 23, —) were required to act "for plaintiff's assignor and the interests represented by him" (R., folio 94, p. 32; Appendix, p. 22), and were required to pay to Mr. Untermyer such part of the fees allowed by the court in bankruptcy as Mr. Untermyer himself should demand.

12. That such an agreement was made, Weil & Thorp denied in their answer and in their evidence. Weil & Thorp attempted in the circuit court of appeals to raise the questions of fact under the evidence, but, on motion of respondent's attorney, the bill of exceptions was stricken out because it was not served in time. Application was also made to dismiss the writ, but that was denied, the court holding:

> "On this review we are at liberty to examine the complaint, answer, findings below, and the judgment entered thereon."
>
> (Opinion, Circuit Court of Appeals, R., 265.)

On this hearing, therefore, the contract must be taken as set forth in the complaints and as found by the referee. For this reason we have quoted at length from the complaints themselves and referred to the opinion of the referee.

We believe this Honorable Court will want to re-examine such an important question as to whether or not any such secret arrangement between counsel for the trustees and counsel for the creditors' committee, as was alleged by Mr. Untermyer and found by the referee, could be sustained.

The decision of the referee and of the circuit court of appeals, if permitted to stand without qualification, will become a menace to honest administration in bankruptcy proceedings and will show that agreements between the officers of the court—the counsel for trustees in bankruptcy—can be made with counsel for a creditors' committee, in defiance of the rules of that court and without the knowledge of the court having the administration of the estate.

The certiorari prayed for "will bring up [those] questions of importance, which it is in the public interest to have decided by the Court of last resort."

The questions thus presented by this petition are as follows:

1. Is an agreement (of which the trustees and court have no knowledge) between general counsel for trustees in bankruptcy and an attorney not appointed or designated by the trustees or court as attorney or counsel for such trustees in bankruptcy enforceable

when that agreement provides that such general counsel shall perform their services "under the direction" and "under the general supervision" of that other attorney and "acting for" that other attorney and for "the interests represented by him"?

2. Is an agreement between the general counsel for trustees in bankruptcy, duly appointed and confirmed, and the attorney for the creditors' committee of the estate, made without the knowledge of trustees or court, enforceable when that agreement provides that said attorneys shall co-operate in their services to the estate, and all allowances made to the counsel to the trustees shall be for the benefit of the attorney for the creditors' committee in such amount as he should decide, and only so much of said allowances kept by the counsel to the trustees as the attorney for the creditors' committee should decide said counsel might retain?

3. Is such an agreement enforceable even if, without the knowledge of trustees or court, such general counsel, pursuant to the said agreement, did render services under the general supervision of the other attorney and acted for him and for the interests which he represented?

4. Is such an agreement enforceable when it provides that out of the allowances to be made to such general counsel by the court the other attorney shall have authority to determine how much thereof shall be re-

tained by the general counsel and how much thereof shall be turned over to the other attorney?

5. Is not such an agreement, under which the general counsel, instead of acting solely for the trustees and under their general direction and supervision, agree to act under the general direction and supervision of that other attorney and for him and for the interests represented by him, contrary to public policy, illegal and void?

6. Is not the vice of such an agreement enhanced by the further provision thereof that such general counsel will divide with such other attorney the fees to be allowed to them by the court, especially under an agreement whereby the other attorney is to determine in his sole discretion how those fees are to be divided?

7. Does not such an agreement tend to deceive the court in which the bankruptcy proceeding is pending, and does not such an agreement tend to corrupt the administration of justice?

8. Is such an agreement, if made without the knowledge or consent of the court, enforceable in view of the provisions of Rule 5 of the Rules in Bankruptcy of the District Court of the United States for the Western District of Pennsylvania?

The agreement, as found by the referee to have been made between the counsel of the trustees in bankruptcy on the one side and the counsel of the committee of creditors, representing a predominating majority of all the creditors, on the other side, is illegal, invalid, and unenforceable.

9. The agreement pleaded and found by the referee is too vague, indefinite, and uncertain to be enforceable.

The trustees in bankruptcy and their counsel are officers of the court which appoints them. Their action must bear the most meticulous scrutiny. Such trustees and counsel are subject to the court's absolute control and supervision. It is immaterial that the particular contract in controversy, as, for example, that here, is not tainted with a perverted motive. The test is the general tendency for evil inherent in all such contracts and not the actual injury in the individual case. The contract alleged and found by the referee could not be more reprehensible, in the eyes of the law, if the trustee in bankruptcy himself had made the same identical agreement alleged with the chairman of the creditors' committee representing a large body of the creditors, the trustee agreeing to work under the direction and supervision of the chairman of the creditors' committee and to divide with the chairman of the creditors' committee whatever allowances should be made to him as commissions by the court, in such proportions as the chairman of the creditors' committee should decide. If such a contract under any circumstances could be sustained, it could not be sustained where secrecy was maintained as to the same and neither the trustees nor the court had any knowledge thereof.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this

Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court, on a date to be designated, a full and complete transcript of the record in the proceedings in said circuit court had in this cause, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by the acts of Congress, to the end that the said judgment of the said United States Circuit Court of Appeals for the Second Circuit be wholly set aside, reversed, and annulled by this Honorable Court, and for such further relief as may seem proper.

And your petitioners will ever pray.

A. LEO. WEIL,
CHARLES M. THORP,
Petitioners.

A. LEO. WEIL,
In Propria Persona and as
Attorney for Petitioners.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, a notary public in and for said Commonwealth and county, and residing in the city of Pittsburgh therein, personally appeared A. Leo. Weil and Charles M. Thorp, who, being by me duly sworn, say that they are the petitioners within named, and that they have read the foregoing petition, and that the

statements of fact therein set forth are true and correct, as they verily believe.

A. LEO. WEIL.
CHARLES M. THORP.

Sworn to and subscribed before me this 27th day of January, A. D. 1928.

[SEAL.] L. A. WIRTH,
Notary Public.

My commission expires January 6, 1929.

No. 38080.

ALLEGHENY COUNTY,
State of Pennsylvania, ss:

I, John Vogt, prothonotary of the Court of Common Pleas in and for the county of Allegheny, in the Commonwealth of Pennsylvania, the same being a court of law and record and having a seal, do hereby certify that L. A. Wirth, Esquire, before whom the foregoing affidavit was taken, and who has thereunto, in his own proper handwriting, subscribed his name to the certificate of the proof and acknowledgment of the annexed instrument, was at that time and is now a notary public in and for the Commonwealth of Pennsylvania, resident of said county aforesaid, duly commissioned and sworn and authorized by law to take and certify affidavits and the acknowledgments and proof of deeds to land, etc., to be recorded, to all whose acts as such due faith and credit are, and of right ought to be, given

throughout the United States and elsewhere; and, further, that said instrument is executed in accordance with the laws of this Commonwealth, and that I am acquainted with his signature and believe the same to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, in said county, this 27 day of January, in the year of our Lord one thousand nine hundred and twenty eight.

[SEAL.] JOHN VOGT, *Prothonotary.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 736.

A. LEO WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY, RESPONDENT.

BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

Preliminary Statement under Rule 25.

This is an application for a writ of certiorari to review the affirmance by the Circuit Court of Appeals of the Second Circuit of the judgment entered in the office of the clerk of the United States District Court for the Southern District of New York on March 25, 1926, for the sum of eighty thousand nine hundred and ninety-one and 8/100 dollars ($80,991.08) in favor of respondent and against petitioners.

This action, which is at law, was tried before a referee, and was brought to recover the equivalent of forty per cent (40%) of the allowance that had been made to petitioners as general counsel for trustees in bankruptcy appointed by the U. S. District Court for the Western District of Pennsylvania. Plaintiff's assignor, Samuel Untermyer, claimed to have made with said general counsel, after their appointment, an agreement which, as pleaded in the complaint and as found by the referee, endowed Mr. Untermyer (a member of the bar of the State of New York and attorney for a creditors' committee holding large claims against said estate) with authority to determine what proportion of the allowances for professional services granted to said counsel to the trustees (members of the bar of the State of Pennsylvania) they might retain and the proportion thereof which Mr. Untermyer should receive. The judgment entered upon the confirmation of the referee's report represented the equivalent of forty per cent (40%) of such allowances granted to petitioners, together with interest thereon to the date of the entry of said judgment.

The opinion of the referee has not been officially published. It is found at page 237 of the record. The District Court of the United States rendered no opinion in confirming the report of the referee. The opinion of the circuit court of appeals in affirming the judgment of the district court has not been officially published. It is found at page 263 of the record.

For the convenience of this Court, these opinions, the requests for findings of fact and the referee's an-

swer thereto, and the pleadings have been collated and printed in a separate volume as an appendix to this brief.

Petitioners invoke the jurisdiction of this Court because the situation here presented involves important questions of public policy, the protection from contamination of the streams of justice, and the regulation of the conduct of members of the bar as officers of the court.

The general nature of the cause, the material allegations of the pleadings, and the facts found have been stated in the petition and will not be restated here.

Specification of Errors.

1. The agreement between the parties, alleged in the complaint and amended complaint, as found, construed, and applied by the referee and by the circuit court of appeals, was contrary to public policy, illegal and void.

2. Petitioners were not estopped to plead and rely, in bar of the action, upon the illegality of the contract found by the referee.

3. The agreement alleged in the complaint and amended complaint and found by the referee was vague, indefinite, and uncertain, and therefore unenforceable.

Point I.

The agreement between the parties alleged in the complaint and amended complaint as found, construed and applied by the referee and by the circuit court of appeals was contrary to public policy, illegal and void.

A trustee in bankruptcy and his counsel are officers of the court who so appoints them. Consequently their actions must be such as to bear the most meticulous scrutiny and are subject absolutely to the court's control and supervision.

It is immaterial that the particular contract is not tainted with a perverted motive, for the test is the general tendency for evil inherent in such a contract and not its actual injury.

The vices of the agreement alleged and found and upon which judgment has been rendered are many. By it the general counsel to the trustees in bankruptcy, to whom alone the general counsel owed the obligation of an attorney to a client, agreed to act, not for the trustees and the estate represented by the trustees, but for Mr. Untermyer and the interests represented by him. Owing loyalty to the trustees solely and subject only to their direction and supervision, they agreed instead to act under the direction and supervision of Mr. Untermyer. Appointed as general counsel by the trustees and made officers of the court by the latter's confirmation of that appointment, they agreed, without the knowledge of the trustees or of the court, to act for Mr. Untermyer and the interests represented by him and under his direction and supervision.

Those vices were enhanced, if that were possible, by the provision in the agreement that after allowances were made to the general counsel by the court they should retain out of those allowances only so much as Mr. Untermyer should fix and should turn over the balance to him. A more effective means for securing to Mr. Untermyer control and direction of the general counsel and obedience by them to his dictates cannot well be suggested.

It is no answer to say that Mr. Untermyer represented the bulk of the creditors, and that therefore the interest of his clients was the same as the interest of the trustees in conserving the estate and saving it from disruption. Granting these facts, it is an all-sufficient answer that for good and sufficient reasons the trustees nevertheless selected and the court confirmed the selection of petitioners and not of Mr. Untermyer as counsel to the trustees. Further, while the interests of the clients of Mr. Untermyer might well be identical with the interests of the trustees in many important respects, there might well be other important respects in which those interests would jar and conflict. There could in no event be any certainty in advance that such partial conflict at least would not exist.

The contract found by the referee comes clearly under the rule laid down by Mr. Justice Field in *Providence Tool Co. vs. Norris*, 2 Wall., 45, where he said:

> "The law looks to the general tendency of such agreements and it closes the door to temptation by refusing them recognition in any of the courts of the country."

And again, in *Palm Baum vs. Magulsky*, 217 Mass., 306, at page 308:

> "It is enough that the contract belongs to the class which has a tendency contrary to the public good, although in the particular instance no injury results."

And again it is said in *Greenhood on Public Policy*, at page 5:

> "It matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The law looks to the general tendency of such contracts."

And again in *Sampliner vs. Motion Picture Patents Co. et al.*, 255 Fed., 242 (1918), C. C. A., So. Dist. of N. Y. (Rogers, C. J.), pp. 251-2:

> "3. The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interests of the public, the agreement is void, even though in the particular case the intent of the parties may have been good and no injury to the public may have resulted. Woodstock Iron Co. *vs.* Richmond, etc. Extension Co., 129 U. S., 643; 9 Sup. Ct., 402; 32 L. Ed., 819; Oscanyan *vs.* Winchester Repeating Arms Co., 103 U. S., 261; 26 L. Ed., 539; Meguire *vs.* Corwine, 101 U. S., 108; 25 L. Ed., 899. As was said by Chief Justice Prentice in Connors *vs.* Connolly, 86 Conn., 641, 656; 86 Atl., 600, 605 (45 L. R. A. [N. S.], 564):
>
> "'It matters not that any particular contract is free from any taint of actual fraud, oppres-

sion, or corruption. The law looks to the general tendency of such contracts.'

"See Greenhood on Public Policy, page 5; Richardson *vs.* Crandall, 48 N. Y., 348. And Mr. Justice Field said in Providence Tool Co. *vs.* Norris, 2 Wall., 45; 17 L. Ed., 868:

"'The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.'

"It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results. Palmbaum *vs.* Magulsky, 217 Mass., 306, 308; 104 N. E., 746; Ann. Cas., 1915D, 799."

The contract in controversy is pregnant with possibilities for evil, the extent whereof is only limited by the imagination.

Let us assume that Mr. Untermyer, the attorney for the creditors' committee, represented through it millions of dollars in claims against the estate. It was naturally to his interest, and it was his duty as counsel for the creditors' committee, to collect these claims placed in its hands and assigned to it. Some of these claims might be doubtful claims. Accordingly, he might say to the attorneys for the trustees, "Do not contest any of these claims represented by us"; and in the event that the attorneys for the trustees would say, "We cannot agree to that; many of these claims are doubtful and are not proper claims against the estate," he could then say to them, "If you contest any of these

claims, I will allow you only a small part of the fee paid to you by the trustees." Or he might say to the attorneys for the trustees, "It is all right for you to contest this claim because I am certain of proving it, but do not contest this other claim, because if you do I might not be able to prove it."

Again, suppose that the creditors' committee had prepared some form of reorganization whereby they proposed to purchase the property of the estate for the benefit of those whose claims were deposited with the creditors' committee, and the price offered was less than the trustees' counsel believed could be obtained from others. Mr. Untermyer might say to the counsel for the trustees, "You are acting under my direction and control. Furthermore, I am to decide what percentage of the fees you are to have. If you oppose this scheme, and if you do not actively assist me in putting it through, I will revenge myself by allowing you a mere pittance out of the fees paid you by the trustees."

Moreover, consider that as the attorneys for the trustees knew that they would not receive the amount of the fees allowed to them by the trustees and the court, but only such portion thereof as Mr. Untermyer should determine, it would be to their interest to demand and seek to obtain from the trustees a much larger amount than they knew their services were otherwise worth and they were satisfied to accept.

So, also, when counsel for the trustees applied to the court for their compensation, it was the duty of Mr. Untermyer, as attorney for the creditors' committee, to examine and pass upon such application. If the fees

requested by the attorneys for the trustees were too large, it was Mr. Untermyer's duty, representing the creditors' committee, to object. If, however, Mr. Untermyer was to receive such fees, and then turn over to the attorneys for the trustees such proportion thereof as he might deem proper, would Mr. Untermyer be unaffected in his attitude toward such allowances?

Under these circumstances, even though intending to act with entire fairness in the matter, would it be proper for Mr. Untermyer to determine whether or not the allowance requested was excessive, without apprising his clients, the creditors' committee, that he had an interest in those fees which were to be allowed to the attorneys for the trustees?

Under Rule 5 of the Rules in Bankruptcy of the court which confirmed the appointment of the petitioners as general counsel, the trustees were prohibited, unless specially authorized by the court, from appointing as their attorney the attorney for any creditor. An agreement by the general counsel to act for one who was the attorney for creditors, no matter how numerous, and for the interests represented by him, i. e., the creditors who were his clients, and to perform services under his direction and supervision, was violative of the letter and the spirit of that rule.

Further citation of authority is perhaps unnecessary, but the following case is so apt to the facts here involved that it will be cited at length.

Marsell vs. Mairs, 203 App. Div., 646 (Affd. without opinion, 236 N. Y., 516), was an appeal by plaintiff

from an order granting defendant's motion for judgment on the pleadings. An involuntary petition in bankruptcy had been filed against the Franklin Brewing Company and an adjudication in bankruptcy was had on January 23, 1917. Prior to that time plaintiff had been counsel for the bankrupt and was familiar with its affairs. The defendant was an attorney. The opinion sets forth the contract sued upon as follows (p. 647):

> "'That thereafter the defendant herein requested plaintiff to assist him in electing and having appointed certain trustees of the said bankrupt corporation, and to thereafter aid in procuring the appointment of the defendant as attorney for the said trustees and to assist the said defendant in the event of his appointment as attorney for the said trustees in all matters of litigation which he might be called upon to do by the said defendant, and said defendant agreed with plaintiff herein that in the event of such appointment as aforesaid, as attorney for the said trustees, that he would pay to the plaintiff herein one third of any and all fees and allowances that might be awarded to and received by him for his services as attorney for the said trustees.
>
> The complaint further alleges that plaintiff used his efforts and assisted in procuring the election and appointment of certain trustees, one of whom was defendant's son, and that he urged upon such trustees the appointment of defendant as their attorney, and that defendant was duly elected and appointed such attorney; that thereafter defendant performed various

services for said trustees, and plaintiff, at defendant's solicitation and request, performed services and carried out every part of the agreement set forth in the complaint, and that on July 29, 1921, defendant was allowed and paid $50,000 for his services as attorney for said trustees, and that by reason thereof plaintiff was entitled to receive from defendant $16,666.66, no part of which has been paid, although demanded.

"The answer denies the material allegation of the complaint, and sets up various defenses as to the legality of the contract."

The motion for judgment on the pleadings was granted upon the ground "that the contract alleged is illegal, void and unenforceable, because it is contrary to public policy, good morals and is unprofessional and subversive of the due administration of justice." The Appellate Division, Second Department, sustained the order and said, at p. 650:

"The probable effect upon the administration of the Bankruptcy Law of such an agreement thus analyzed convinces me that it is an evil thing. It is not enough, in my opinion, that such an agreement may be carried out innocently and in good faith, accomplish its purpose, and also secure properly qualified trustees and an able and conscientious attorney to act for them. The vice lies in the manifold possibilities for evil. A judge may, if permitted, hear his kinsman's case and decide it strictly according to fact and law, and without partiality or favor, but the law forbids such practice because it is

fraught with danger to the administration of justice. So in the case at bar, we may grant the fitness and good faith of the parties, but we cannot permit to be done that which, if established as legal, may and probably would lead to the utter subversion of the purpose and intent of the Bankruptcy Act.

"In *Veazey v. Allen* (173 N. Y., 359, 368), our court of appeals defines public policy in the following language: 'This contract is assailed on the ground of public policy.' Lord Brougham defined public policy as 'that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law.' In many of its aspects the term 'public policy' is but another name for public sentiment and, as that is often transitory or shifting, it lacks the permanency upon which fixed principles of law are, or should be, based. There are, however, other phases of public policy which are as enduring and immutable as the law of gravity. One of them is that, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare. That sound morality and civic honesty are corner stones of the social edifice is a truism which needs no reenforcement by argument. It may, therefore, be taken for granted that whenever our courts are called upon to scrutinize a contract which is clearly repugnant to sound morality and civic honesty, they need not look long for the well

> fitting definition of public policy, nor hesitate in its practical application to the law of contracts.'
>
> "Further discussion of the question seems unnecessary. The agreement in question clearly offends public policy, as thus defined. As it is an entire agreement, all parts of which are dependent upon an illegal consideration, it is, therefore, void and cannot be enforced."

The circuit court of appeals misapprehended the contract set up in the pleadings, disregarded the vicious elements thereof, and apparently affirmed an altogether different contract than the one in controversy here and which was before the court for its adjudication. That court held that the attorneys for the trustees could employ Mr. Untermyer to assist them and pay him for his services out of the fees to be received by them as counsel for the trustees. Said that court (Record, p. 269):

> "It is apparent that the parties to this agreement as found, in retaining the services of the assignor of the plaintiff below, had in mind subserving the interests of the creditors * * *. It was not unlawful for them to retain Mr. Untermyer as counsel and thus to obtain competent help in the common effort to bring to the trustees the assets of the estate."
>
> (Citing authorities.)
>
> "Such an agreement is not contrary to public policy."

No fault could be found with this statement of the law. That, however, was not the contract set up in the court below and found by the referee. But even such a contract as that referred to by the court of appeals, if to the same had been added an agreement whereby they not only employed Mr. Untermyer to assist, but counsel for the trustees agreed to abdicate their duties and obligations as counsel for the trustees and to give to Mr. Untermyer the direction, control and supervision of their action as counsel of the trustees, so that in fact and effect he became in their place the counsel for the trustees and they acted solely as his representative and to represent the interests of his clients,—then even under these circumstances, it is apprehended, no court would approve of such a contract, because it would be contrary to public policy and a fraud upon the court, especially if made without the knowledge of either the trustee or the court.

But the contract sued upon specifically states that Mr. Untermyer employed Weil & Thorp, and that they were to act as his agents and for him and "the interests represented by him," and "under the direction" and "under the general supervision" of Mr. Untermyer. (Complaint, R., folios 19, 20, 21, pp. 6, 7; Appendix, pp. 2, 3; Amended Complaint, R., folios 94, 96, 107, 108, pp. 31-33; Appendix, pp. 21-23.)

As showing this complete domination and control and agency, it was provided that all fees received by Weil & Thorp were to be practically held for the account of Mr. Untermyer, who was to determine what portion thereof should be retained by Weil & Thorp

and what amount thereof should be paid over to him; his determination of this question being uncontrolled, there being no allegation even that the division was to be made by agreement between himself and Weil & Thorp.

The contract specifically set forth in the pleadings and found by the referee was not the contract referred to by the court of appeals, but that after their appointment as counsel for the trustees Weil & Thorp agreed with Mr. Untermyer to act for the interests represented by him, under his direction, under his general supervision, and that he was to control the amount of the allowances that should be made to them on account of their services as such counsel to the trustees. It cannot be confounded with, and should not be confused with, the not unusual case of counsel representing trustees employing other counsel to assist them, either generally or in some specific case.

Point II.

Petitioners were not estopped to plead and rely, in bar of the action, upon the illegality of the contract found by the referee.

Under ordinary circumstances one of two parties to a contract might be estopped from making a certain defense because of his conduct. Such is not the case where the defense is that the contract is contrary to public policy or a fraud on the court. In other words, if two parties enter into a contract which is illegal *per se*, as being contrary to public policy, and hence

void, neither party is estopped from raising the question of its invalidity.

The following cases clearly illustrate this principle:

Roberts vs. Criss, 266 Fed., 296 (C. C. A., N. Y.), pp. 299-303:

> "The courts do not aid the parties to illegal agreements. If any principle of law is settled, it is that a party to an illegal undertaking cannot come into court either of law or equity and ask to have his illegal contract carried out. *Ex dolo malo non oritur actio*, and *in pari delicto potior est conditio defendentis*. It makes no difference whether the contract has been executed, or remains still executory. The defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff. It was said by Lord Mansfield in Holman *vs.* Johnson, 1 Cowper, 341, 343:
>
> "'No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa* or the transgressions of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.'"

Among the cases cited in the opinion of the court is *Oscanyan vs. Winchester Repeating Arms Co.*, 103 U. S., 261, where this Court said:

> "The position of the plaintiff that the illegality of the contract in suit cannot be noticed,

> because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration, had it not been earnestly pressed upon our attention by learned counsel * * *. It [the objection of illegality] was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law * * *. It would not be restrained by defects of pleading, nor indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered."

These authorities answer the argument of the Referee that the defendant as a party to the contract cannot be heard to urge illegality of the contract in suit as being contrary to public policy, because they hold that—

> "the defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff."

We submit that the court, regardless of the action of the parties, when the fact appears that the contract is contrary to public policy, or involves a fraud upon the court, or is of such type as to be a potential fraud upon the court, will refuse its aid to the party seeking to enforce such a contract. This is especially true of the alleged contract in this case as construed and applied, considering its tendency to pervert the administration of justice.

Point III.

The agreement alleged in the complaint and amended complaint and found by the referee was vague, indefinite and uncertain, and therefore unenforceable.

By the agreement as pleaded and found, respondent's assignor was constituted the sole judge as to the manner in which the allowances made to petitioners as attorneys for the Trustees in Bankruptcy should be apportioned between petitioners and respondent's assignor. There is no finding in the Record that respondent's assignor's ultimate determination that sixty per cent (60%) of such allowances might be retained by petitioners and that forty per cent (40%) thereof should be paid to respondent's assignor, was a fair and equitable determination. There is no finding that the services rendered by respondent's assignor justified a compensation to respondent's assignor of forty per cent (40%) of such allowances. As far as appears from the Record, respondent's assignor's determination was arbitrary and without justification in fact. The circuit court of appeals, in sustaining the agreement, said that:

> "Allowing Mr. Untermyer to determine what was fair and equitable did not make the agreement vague or indefinite. His judgment was to prevail but it could not be arbitrary or capricious; it was to be fair and equitable. Such agreements are enforceable" (citing cases). (R., 270.)

There is no finding, however, in this Record that the determination of Mr. Untermyer was fair and equitable. On the contrary, the referee declined to find, as requested by respondent's assignor, that Mr. Untermyer's determination was made "in good faith," or that it was "a fair and reasonable" determination (R., folio 7197, p. 2399, Appendix, p. 125), and the referee specifically declined to find that Mr. Untermyer's determination and decision "were in all respects reasonable and equitable and commensurate with the relative services rendered as aforesaid" (R., folio 7198, p. 2400, Appendix, p. 126). It is difficult to understand, therefore, upon what theory the circuit court of appeals arrived at the conclusion that the determination made by Mr. Untermyer was fair and equitable.

The courts of New York, where this action was brought, have held that agreements of the kind pleaded and found herein are vague, indefinite and unenforceable.

Varney vs. Ditmars, 217 N. Y., 223.

United Press vs. New York Press Co., 164 N. Y., 406.

Barker vs. O'Grady, 163 N. Y. Supp., 594.

McDonald vs. Acker, Merrill & Condit Co., 192 App. Div., 123.

Canet vs. Smith, 173 App. Div., 241.

Featherstone vs. Fowler, 174 App. Div., 452.

Bluemmer vs. Garvin, 120 App. Div., 29.

In *Barker vs. O'Grady, supra,* the Court said:

> "The plaintiffs allege that they made an oral contract with the defendant under which he agreed to make an 'equitable division' with them of fees received by him as attorney for bankruptcy proceedings. It is impossible to determine the intention of the parties with any reasonable degree of certainty as to what share of the fees each one was to receive, and there is no rule of damages known to the law fine enough to determine what constitutes an 'equitable' division under the terms of the contract. Both plaintiffs and defendant are attorneys and either failed to complete their contract or failed to put it in language sufficiently definite to make it enforceable. * * * In either case the plaintiffs cannot recover upon it."

In *Varney vs. Ditmars, supra,* the Court of Appeals of New York set forth the contract as follows:

> "I am going to give you $5 more a week; if you boys will go on and continue the way you have been and get me out of this trouble and get these jobs started that were in the office three years, on the first of next January I will close my books and *give you a fair share of my profit.*"

The Court held that the contract was unenforceable, and said, at p. 228:

> "It is elementary in the law that, for the validity of a contract, the promise, or the agreement, of the parties to it must be certain and explicit and that their full intention may be as-

certained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to."

CONCLUSION.

For the foregoing reasons petitioners' counsel respectfully submit that this Court should issue its writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the decision discussed in the foregoing.

Respectfully submitted,

A. LEO WEIL,
In Propria Persona and as
Petitioners' Counsel.

PETITIONER'S BRIEF

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 59

A. LEO. WEIL and CHARLES M. THORP, doing business under the firm name and style of WEIL & THORP, *Petitioners*,

vs.

EDWARD M. NEARY, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONERS

A. LEO. WEIL,
In Propria Persona, and as Counsel for Petitioners,
721 Frick Bldg., Pittsburgh, Pa.

J. G. MILBURN, JR.,
Of Carter, Ledyard & Milburn,
54 Wall Street, New York, N. Y.,

LOUIS SALANT,
Of Stein & Salant,
Marbridge Bldg., New York, N. Y.,
Of Counsel.

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James McMillin Printing Company, Penn Ave. and Barbeau St., Pittsburgh, Pa.

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IN THE

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OCTOBER TERM, 1928

No. 59

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of WEIL & THORP, *Petitioners*,

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BRIEF FOR PETITIONERS

Reference to Official Report of Opinions Delivered In the Courts Below

Weil et al. vs. Neary, 22 Fed. Rep. (2d series), 893, and (R. 175). No opinion was filed by the United States District Court. Referee's Opinion appears (R. 48); not reported.

Jurisdiction of this Court

While perhaps unnecessary, the question of jurisdiction having been decided in this case, on the granting of the certiorari by this Court, before the adoption of its revised rules,

nevertheless it can do no harm to restate the basis of jurisdiction, in compliance with said revised rules.

(a) Petition for certiorari in this case was presented under Section 240 a, Judicial Code, 43 Stat. L., 938; U. S. Code, Title 28, Sec. 347.

(b) The United States Circuit Court of Appeals, Second Circuit, on the 19th day of December, 1927, affirmed a judgment (R. 183) of the District Court of the United States for the Southern District of New York, entered by that Court on March 15, 1926 (R. 144-5-6), for the sum of $80,991.08, against Weil & Thorp, Petitioners here, who were the defendants in the District Court below, and in favor of the Respondent here (the assignee of Samuel Untermyer), the plaintiff in the District Court below. The said District Court entered its judgment on the report of the Referee (R. 108), to whom this action had been referred. Such entry was a mere formality, without opinion, that being the practice of that Court.

Petition for certiorari was filed February 2, 1928 (R. 185), and allowed March 19, 1928 (R. 185).

(c) The jurisdiction of this Court is invoked:

1. Because this case involves questions of law of supreme importance, relating to the administration of justice by the courts, which it is in the public interest to have adjudicated by this Court. (*Magnum Import Co. et al. vs. Coty*, 262 U. S., 159; 67 L. Ed. 922).

2. Because this case raises questions of the highest public policy in the administration of justice; guarding the courts against secret agreements by opposing counsel; preventing from contamination the streams of justice; and regulating the conduct of members of the bar in Federal bankruptcy cases. [Raised by the Answer (R. 33, Par. 10th); Request refused (R. 101-2); Exception (R. 141-3). Assigned as error Circuit Court of Appeals (R. 169).] The agreement in controversy between the parties hereto appears in the Complaint (R. 17); as found by the Referee (R. 102

108 and 108-114). The judgment had thereon was affirmed by the Circuit Court of Appeals (R. 175-183).

3. Because the agreement made between counsel for the Trustees in Bankruptcy and counsel representing a majority of general creditors, without the knowledge of the Trustees or the Court of Bankruptcy, alleged in the Complaint, found by the Referee, and affirmed by the courts below, by which counsel for the Creditors' Committee was to determine the proportion in which the fees allowed by the Court to counsel to the Trustees were to be distributed between himself and them, was unprofessional, illegal and void, and was vague, indefinite and uncertain, and therefore unenforceable, according to the great weight of authority, especially where the Referee refused to find that such determination was fair, reasonable and equitable. [Request refused (R. 102 at R. 106); Exception (R. 143); Assigned as error Circuit Court of Appeals (R. 173).]

Brief Statement of the Case

Edward M. Neary, plaintiff in the court below, is the assignee of Samuel Untermyer, a member of the bar of the State of New York; A. Leo. Weil and Charles M. Thorp, members of the bar of the State of Pennsylvania, were the defendants in the court below.

The agreement in controversy, as averred in the Complaint and Amended Complaint, was denied by Weil & Thorp, by Answer, and, on the hearing, by evidence. Notwithstanding, the Referee found the agreement substantially as averred in the Complaints, and directed that judgment be entered thereon, which judgment was accordingly entered by the court.

The alleged agreement, as averred in the Complaints, and as found by the Referee, was as follows: that Weil & Thorp, who had been appointed general counsel by the Trustees in Bankruptcy of the estate of J. V. Thompson, and which appointment was confirmed by the District Court of

the United States for the Western District of Pennsylvania, after their appointment as such general counsel, without the knowledge of the Trustees or the Court, entered into an agreement with Samuel Untermyer, who was attorney for a Creditors' Committee representing a large majority in numbers and amount of the creditors of said Thompson, to perform their professional services as such general counsel for the Trustees and the estate represented by them, "under the diriection" (R. 19, 5th Par.) and "under the general supervision" (R. 19, 6th Par., R. 112, 13th Par.) of Mr. Untermyer, and at the same time to act for the interests "represented by" (R. 19, top of page, and R. 56) Mr. Untermyer, and that when allowances should be made by the Court to Weil & Thorp for their services, they were to hold the whole amount of such allowances for the account of Mr Untermyer, who should decide how much thereof Weil & Thorp were to receive and how much he, Mr. Untermyer, should receive (R. 19, 5th Par.).

The agreement as averred in the Complaints and found by the Referee was substantially that while Weil & Thorp, by appointment by the Trustees and confirmation of the Court, were *in name* general counsel for the Trustees, *in truth and fact* they were only employes and agents of Mr. Untermyer, wholly subject to his domination and direction; and, as stated, neither the Trustees nor the Court were advised or informed or knew of this alleged agreement, until this suit was brought.

Weil & Thorp, by their Answers, indignantly denied the making of such a contract, and throughout the proceedings, by their evidence and argument, insisted that no such contract had been made by them, and further attacked the contract alleged, as illegal, void and unenforceable, because contrary to public policy and good morals, unprofessional and subversive of the due administration of justice.

Specifications of Error Intended To Be Urged

1. The agreement between the parties, alleged in the Complaint, found, construed and declared by the Referee and the Circuit Court of Appeals, is contrary to public policy, is unprofessional, would tend to contaminate the streams of justice, and is illegal and void. [Request to this effect refused (R. 101-2); Exception (R. 142-3); Assigned as error Circuit Court of Appeals (R. 169).]

2. The entry of judgment in favor of the respondent here and against the petitioners here, was contrary to law and public policy, subversive of the administration of justice, illegal and void. [Request to this effect refused (R. 101-2); Exception (R. 142-3); Assigned as error Circuit Court of Appeals (R. 169).]

3. The agreement alleged in the Complaint and found by the Referee, was vague, indefinite and uncertain, and therefore unenforceable. [Request to this effect refused (R. 102); Exception (R. 143); Assigned as error Circuit Court of Appeals (R. 173).]

4. The only facts, if any, that would cure the vagueness and indefiniteness of the alleged agreement (if otherwise legal) allowing Mr. Untermyer to determine what was a fair and equitable distribution between himself and Weil & Thorp, were that such determination was not arbitrary or capricious, but fair and equitable, and the Referee refused to so find. (R. 106, 13th Request of defendant in error, plaintiff below, and Answer thereto.)

Argument

THE FACTS UNDER WHICH THIS CONTROVERSY AROSE STATED CHRONOLOGICALLY AND IN DETAIL

1st. J. V. Thompson, of Uniontown, Pa., owning a vast acreage of coal, in 1915 became financially involved. Some of his unsecured creditors employed Mr. Untermyer as attorney to represent them. Thompson's indebtedness, secured and unsecured, aggregated about thirty million dollars. Mr. Untermyer organized a Creditors' Committee, representing, it is alleged, over ninety per cent. of the unsecured creditors, and became their attorney. He had receivers for the estate of said Thompson appointed by the State courts. This receivership was set aside in May, 1917, by a decision of the Supreme Court of Pennsylvania. (R. 90-91.)

2nd. Mr. Untermyer concluded to institute bankruptcy proceedings. He retained Weil & Thorp to institute, under his supervision, such proceedings, and to obtain an adjudication of Mr. Thompson as a bankrupt, upon an agreement that the amount to be paid to Weil & Thorp for their services would be $5,000.00, or such amount as Mr. Untermyer should designate. (R. 110, Par. 6th.)

3rd. Accordingly the bankruptcy proceedings were instituted by Weil & Thorp in Pittsburgh, in the District Court of the United States for the Western District of Pennsylvania, and Thompson was duly adjudicated a bankrupt on September 10, 1917. (R. 110, Par. 8th.)

4th. After said adjudication, trustees for the bankrupt estate were duly appointed. (R. 93, Par. 13th.)

5th. The Trustees appointed Weil & Thorp as general counsel for the Trustees, and the Court confirmed such appointment, upon Weil & Thorp's certificate in writing, under Rule 5 of the District Court, that they did not represent any interest which would in any way be antagonistic or adverse in the event they were so employed. (R. 93-94, Par. 13th.)

6th. Rule 5 above referred to, is as follows (R. 94, Par. 14th):

> "Unless specially authorized by the Court, receivers and trustees in bankruptcy shall not retain as their attorney, the attorney of the bankrupt, of the petitioning creditors, of the person applying for the appointment of a receiver, or of any creditor, and trustees shall not retain as their attorney any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies."

This Rule was in force and effect before and during the administration of the Thompson estate, and is still in force. (R. 94, Par. 14th.) Weil & Thorp had been employed by Mr. Untermyer, attorney for the Creditors' Committee, to secure the adjudication in bankruptcy and the protection of the estate meanwhile from disintegration by sales or judgments, foreclosure of mortgages, and the like, but after the appointment of the Trustees, and when they were appointed general counsel of the Trustees, they claim they no longer represented Mr. Untermyer and his Creditors' Committee, nor could they legally or professionally have so represented them.

7th. Mr. Untermyer was not appointed counsel to the Trustees, and as attorney for the Creditors' Committee could not have complied with said Rule 5. The Trustees and the Court had no knowledge or information, until this suit was brought, that Mr. Untermyer claimed or pretended to be the associate of Weil & Thorp, as such general counsel to the Trustees, or that there was any agreement that Weil & Thorp, as such general counsel, were to act under the direction and control of said Untermyer, instead of upon their own judgment and initiative. (R. 71.)

8th. Weil & Thorp, as general counsel, *inter alia* represented the Trustees in contesting disputed claims against the estate, some of which were filed by Mr. Untermyer through his Creditors' Committee. (R. 69-71.)

9th. In June, 1921, Edward M. Neary, as the assignee of the claim in controversy of Samuel Untermyer, brought his action at law against Weil & Thorp, on an alleged agreement between Untermyer and Weil & Thorp, which he set up in his Amended Complaint, as follows:

> "Fifth. In the course of the administration of the estate of the said Thompson, various complications arose which prolonged the period of the administration of the estate beyond that contemplated at the time of the institution of the aforesaid bankruptcy proceedings, and which rendered it necessary for the defendants and the plaintiff's assignor and the firm of lawyers with which he was and is associated together to perform more extensive and laborious services than it was originally believed to be necessary for the defendants to perform in the administration of the said estate in bankruptcy. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that the plaintiff's assignor and the firm with which he was associated should together perform such services and that the compensation of the defendants for services in said bankruptcy proceedings was not to be limited to the sum of five thousand dollars ($5,000.00), as theretofore stipulated, and in lieu of the compensation originally stipulated it was agreed that the plaintiff's assignor and the firm of lawyers with which he was associated *should collaborate with the defendants under the direction of the former in the performance of such services* and that the defendants were to receive for the services rendered by them out of such allowance as should eventually be made by the Court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him." (R. 19.)

> "Sixth. Pursuant to such arrangement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision of plaintiff's assignor, and with the active aid of the latter and of the firm with which he was associated,*

for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918, July 2, 1919, and July 18, 1919, in the total sum of thirty thousand five hundred dollars ($30,500); on or about June 1, 1920, in the sum of forty-five thousand three hundred and sixty-six dollars and sixty-six cents ($45,366.66); on or about October 27, 1920, in the sum of sixty-eight thousand and ninety-three dollars and thirty-two cents ($68,093.32); on or about November 30, 1920, in the sum of twenty-one thousand dollars ($21,000); and on or about May 10, 1924, in the sum of twenty-three thousand three hundred and thirty-three dollars and thirty-one cents ($23,333.31), amounting to the total sum of one hundred and eighty-eight thousand and two hundred and ninety-three dollars and twenty-nine cents ($188,293.29), to be paid out of the estate of the bankrupt in payment for the services rendered by the defendants in said proceedings, and on or about the dates hereinbefore set forth payments were received by the defendants in the amounts above set forth, together aggregating said sum of $188,293.29, which were paid to the defendants by the trustees in bankruptcy of the said Thompson. A substantial part of the services for which said allowances were made was performed by the plaintiff's assignor and by the said firm with which he was and is associated." (R. 19-20.)

"Eighth. On being informed of such payments to the defendants, plaintiff's assignor, recognizing the aforesaid agreement and the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, determined that a fair and reasonable division of the said sum of $188,293.29 paid to the defendants as aforesaid, and of any further sums to be allowed the defendants in said proceedings, was that the defendants should retain sixty per cent. (60%) of the said sums received by them, and of any further sums allowed them in said proceedings, and that the remaining forty per cent. (40%) was to be paid to him, and

informed the defendants of his determination with respect to such division." (R. 20.)

The Amended Complaint was filed after plaintiff's evidence was concluded, on motion of plaintiff's counsel to make the pleadings conform to the proof. Plaintiff accordingly had every opportunity to correctly set forth the alleged agreement on which he founded his claim. Neither the Original Complaint nor the Amended Complaint contained a syllable of explanation justifying a contract between counsel representing hostile interests, or interests that might become hostile, or explaining the imposition and fraud this alleged agreement would be upon the Trustees and the Court, there being no allegation that either the Trustees or the Court were informed or had knowledge of this alleged agreement. (See Plaintiff's Complaint, R. 3, and Amended Complaint, R. 17.)

The Referee, after reviewing these averments of the Complaint, and quoting from the same and the denials of the Answer, and referring to the evidence, concludes (R. 53):

"The Referee has come to the conclusion that a contract substantially as alleged by the plaintiff did exist."

In the Twelfth Request for Findings of Fact by the plaintiff in the District Court below, the Referee was asked to find, and so found (R. 106):

"Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, who acted for him," &c.

In the Eighth Finding of Fact by the Referee (R. 110), he finds:

"• • • that on or about September 10, 1917, the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said estate was thereupon administered in such bankruptcy proceedings,

the defendants herein acting *at the instance of plaintiff's assignor and for the creditors represented by him* whose interests were identical with those of the general creditors of the said Thompson."

And again, in the Thirteenth Finding of Fact by the Referee (R. 112), he found:

"Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision and with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, who acted for him,* • • •."

(Italics, in above quotations, ours.)

The above citations from the Respondent's own Complaint in the court below, from his own request for Findings of Fact, from the opinion of the Referee, and the Referee's specific Findings of Fact, are perhaps unduly prolix and unnecessary, but are made in an exuberance of caution, so that there can be no controversy as to the character of the agreement set up in the pleadings by the Respondent, the plaintiff in the court below, on which he sought to recover, and because of the position taken by the Respondent in his brief in this Court in opposition to the petition for certiorari.

These citations show that Mr. Untermyer claims, and the Referee so found, to wit: that although not appointed by the Trustees as counsel, or ratified or confirmed as such by the Court, Mr. Untermyer entered into an agreement with Weil & Thorp, after their appointment as general counsel for the Trustees, whereby said duly appointed counsel were required to act "under the general supervision of" Mr. Untermyer (R. 19, Par. 6th, and R. 112); were required to act "for plaintiff's assignor and the interests represented by him" (R. 19 and R. 56); and were required to pay Mr. Untermyer such part of the fees allowed by the Court of Bankruptcy to said general counsel as Mr. Untermyer himself should demand.

Weil & Thorp denied the making of such an agreement in their Answers and in their evidence, and attempted in the

Circuit Court of Appeals to raise all of these questions of fact, under the evidence, by assignments of error, but on motion of Respondent's attorney the bill of exceptions was stricken out, because it had not been served in time. Wherefore, Weil & Thorp could not raise these questions of fact in the Circuit Court of Appeals, nor can they raise them in this Court, on this record. This Court, in this review, as in the Circuit Court of Appeals in the review there, is nevertheless at liberty to examine the Complaint, the Answers, the Findings below, and the judgment entered thereon, and decide the questions of law now raised here in this Court on that record. Petitioners will therefore confine their argument to that record.

The foregoing facts catapult upon the minds of Court and counsel the following grave, significant, serious and momentous questions of public policy and of law, affecting the administration of justice and the protection of its streams from pollution and contamination:

1. Is an agreement enforceable (of which the Trustees and Court have no knowledge) made between general counsel for Trustees in Bankruptcy and an attorney of a Creditors' Committee (not appointed or designated by the Trustees or Court as attorney or counsel for such Trustees), when that agreement provides that such general counsel shall perform their services "under the direction" and "under the general supervision" of that attorney of the Creditors' Committee, and "acting for" that attorney and for "the interests represented by him"?

2. Is an agreement between the general counsel for Trustees in Bankruptcy, duly appointed and confirmed, and the attorney for the Creditors' Committee of the estate, made without the knowledge of Trustees or Court, enforceable, when that agreement provides that said attorneys shall cooperate in their services to the estate, and that all allowances made to the counsel to the Trustees shall be for the benefit of the attorney for the Creditors' Committee, in such amount as he shall decide, and that only so much of said allowances shall be retained by the counsel to the Trustees as the attorney for the Creditors' Committee shall decide said counsel might retain?

3. Is such an agreement enforceable even if, without the knowledge of Trustees or Court, such general counsel, pursuant to the said agreement, did render services under the general supervision of the other attorney, and acted for him and for the interests which he represented?

4. Is such an agreement enforceable when it provides that out of the allowances to be made to such general counsel by the Court, the attorney of the Creditors' Committee shall have authority to determine how much thereof shall be retained by the general counsel and how much thereof shall be turned over to the attorney for the Creditors' Committee?

5. Is not such an agreement,—under which the general counsel, instead of acting solely for the Trustees and under their direction and supervision and that of the Court, agree to act under the general direction and supervision of the attorney for the Creditors' Committee and for him and for the interests represented by him,—against public policy, and therefore illegal and void?

6. Is not the vice of such an agreement enhanced by the further provision thereof that such general counsel will divide with the attorney for the Creditors' Committee the fees to be allowed to such general counsel by the Court, especially where the attorney for the Creditors' Committee is to determine in his sole discretion how those fees are to be divided?

7. Is not such an agreement a fraud on the Court in which the bankruptcy proceeding is pending, and has not such an agreement a tendency to corrupt the administration of justice, and be a vehicle, under conditions that may arise, for contamination and pollution of the streams of judicial procedure?

8. Is such an agreement, if made without the knowledge or consent of the Court, enforceable, in view of the provisions of said Rule 5 [R. 94, Par. 14] of the Rules of Bankruptcy of the District Court of the United States for the Western District of Pennsylvania?

9. Is the agreement pleaded by Respondent, and found by the Referee, too vague, indefinite and uncertain, to be enforceable, especially where there is no allegation by the Respondent (the plaintiff in the court below), and no finding, that the determination of the division of fees by Mr. Untermyer was fair and reasonable, under the facts of the case, but on the contrary the Referee refused to so find?

POINT I

THE AGREEMENT BETWEEN THE PARTIES ALLEGED IN THE COMPLAINT, AND FOUND, CONSTRUED AND APPLIED BY THE REFEREE, WAS CONTRARY TO PUBLIC POLICY, ILLEGAL AND VOID.

A Trustee in Bankruptcy and his counsel are officers of the Court who so appoints them. Consequently, their actions must be such as to bear the most meticulous scrutiny, and are subject absolutely to the Court's control and supervision.

It is immaterial that the particular contract is not tainted with a perverted motive, for the test is the general tendency for evil inherent in such a contract, and not its actual injury.

The vices of the agreement alleged and found, and upon which judgment has been rendered, are many. By it the general counsel to the Trustees in Bankruptcy, to whom alone the general counsel owed the obligation of an attorney to a client, agreed to act, not for the Trustees and the estate represented by the Trustees, but for Mr. Untermyer and the interests represented by him. Owing loyalty to the Trustees solely, and subject only to their direction and supervision and that of the Court, they agreed instead to act under the direction and supervision of Mr. Untermyer. Appointed as general counsel by the Trustees and made officers of the Court by the Court's confirmation of that appointment, they agreed, without the knowledge of the Trustees or of the Court, to act for Mr. Untermyer and the interests represented by him, and under his direction and supervision.

These views were enhanced, if that were possible, by the provision in the agreement that after allowances were made to the general counsel by the Court they should retain out of those allowances only so much as Mr. Untermyer should fix, and should turn over the balance to him. A more effective means for securing to Mr. Untermyer control and direction of the general counsel to the Trustees, and obedience by them to his dictates, can not well be imagined.

It is no answer to say that Mr. Untermyer represented the bulk of the creditors, and that therefore the interest of his clients was the same as the interest of the Trustees in conserving the estate and saving it from disruption. Granting these facts, it is an answer that for good and sufficient reasons the Trustees nevertheless selected and the Court confirmed the selection of Weil & Thorp, and not Mr. Untermyer, as counsel to the Trustees. Further, while the interests of the clients of Mr. Untermyer might be identical with the interests of the Trustees in many important respects, there might well be other important respects in which those interests would not be identical, but would conflict, as they subsequently did. There could in no event be any certainty in advance that such conflict would not arise. There was almost a certainty that it would arise, just as it did.

The contract pleaded and found by the Referee comes clearly under the Rule laid down by Mr. Justice Field, in *Providence Tool Co.* vs. *Norris*, 2 Wall., 45, where he said:

> "The law looks to the general tendency of such agreements and it closes the door to temptation by refusing them recognition in any of the courts of the country."

The authorities are collated in *Stauffiger* vs. *Medina Picture Patents Co., et al.*, 225 Fed. 212 (1915), C. C. A., 2d Dist. N. Y., (Rogers, C. J.), pp. 214-2:

> "2. The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interests of the Public, the agreement is void, even though in the particular case the intent of the parties

may have been good and no injury to the public may have resulted. *Woodstock Iron Co. v. Richmond, etc., Extension Co.*, 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; *Gonzales v. Winchester Repeating Arms Co.*, 162 U. S. 264, 26 L. Ed. 539; *Meguire v. Corwine*, 101 U. S. 108, 25 L. Ed. 899. As was said by Chief Justice Prentice in *Connors v. Connolly*, 86 Conn. 641, 656, 86 Atl. 698, 665, (45 L. R. A. (N. S.) 264):

> "It matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The law looks to the general tendency of such contracts."

See Greenhood on Public Policy, p. 5; *Richardson v. Crandall*, 68 N. Y. 348. And Mr. Justice Field said in *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868:

> "The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country."

It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results. *Fuimbeano v. Mapoledy*, 217 Mass. 206, 209, 104 N. E. 706, Ann. Cas. 1915D, 799."

The contract in controversy is weighed down with obvious probabilities for evil, and the extent of the load of probabilities for evil is limited only by the exuberance of one's imagination.

The following examples are submitted: Mr. Untermyer, the attorney for the Creditors' Committee, represented millions of dollars in claims against the estate. It was to his interest, as it was his duty, to collect these claims in the hands of the Committee and assigned to it. Some of these claims might be doubtful. Accordingly, he might say to the attorneys for the Trustees, "You agreed to act under my supervision. Do not enforce any of these claims represented

by us. If you do, I will allow you only a small part of the fee paid to you by the Trustees." Or he might say to the attorneys for the Trustees, under the same threat, express or implied, "It is all right for you to contest this claim, because I can prove it, but do not contest this other claim, because I might not be able to prove it."

Again, suppose that the Creditors' Committee had some plan of reorganization whereby they proposed to purchase the property of the estate for the benefit of those whose claims were deposited with the Creditors' Committee, and the price offered was less than the Trustees' counsel believed could be obtained from others. Mr. Untermyer might say to the counsel for the Trustees, "You are acting under my direction and control. Furthermore, I am to decide what percentage of the fees you are to have. Oppose my plan of reorganization at your peril."

Again, consider that as the attorneys for the Trustees knew that they would not receive the amount of the fees allowed to them by the Trustees and the Court, but only such portion thereof as Mr. Untermyer should determine, it would be to their interest to demand and to try to obtain from the estate a much larger allowance than they otherwise would ask.

So, also, when counsel for the Trustees applied to the Court for their allowances, it was the duty of Mr. Untermyer, as attorney for the Creditors' Committee, to object, if the fees requested were too large. If, however, Mr. Untermyer was to receive such proportion thereof as he might decide, could Mr. Untermyer be impartial in deciding whether or not to object?

Under such a contract, would it be proper for Mr. Untermyer to determine whether or not the allowances requested were excessive, without apprising his clients, the Creditors' Committee, that he had an interest in those allowances?

Illustrations of the evil possibilities of such an agreement could be indefinitely multiplied.

Under Rule 5 (R. 94, Par. 14th) of the Rules in Bankruptcy of the Court which confirmed the appointment of

Weil & Thorp as general counsel, the Trustees were prohibited, unless specially authorized by the Court, from appointing as their attorney the attorney for any creditor. An agreement by the general counsel to act for the attorney of the Creditors' Committee,—no matter how many creditors nor how large an amount such Committee controlled—and for their interests, and under the direction and supervision of the attorney of the Creditors' Committee, was contrary to the letter and the spirit of that Rule, and in direct violation thereof.

Further citation of authority is perhaps unnecessary, but the opinion of the Court in the following case is so apt that it will be cited.

Marsell vs. Moires, 203 App. Div., 646 (Affirmed without opinion, 236 N. Y., 516), was an appeal by plaintiff from an order granting defendant's motion for judgment on the pleadings, on the ground "that the contract alleged is illegal, void and unenforceable, because it is contrary to public policy, good morals, and is unprofessional and subversive of the due administration of justice." The Appellate Division, Second Department, sustained the order, and said, at page 650:

> "The probable effect upon the administration of the Bankruptcy Law of such an agreement thus analyzed convinces me that it is an evil thing. It is not enough, in my opinion, that such an agreement may be carried out innocently and in good faith, accomplish its purpose, and also secure properly qualified trustees and an able and conscientious attorney to act for them. The vice lies in the manifold possibilities for evil. A judge may, if permitted, hear his kinsman's case and decide it strictly according to fact and law, and without partiality or favor, but the law forbids such practice because it is fraught with danger to the administration of justice. So in the case at bar, we may grant the fitness and good faith of the parties, but we can not permit to be done that which, if established as legal, may and probably would lead to the utter subversion of the purpose and intent of the Bankruptcy Act.

In *Veazey vs. Allen* (173 N. Y., 359, 368), our Court of Appeals defines public policy in the following language: 'This contract is assailed on the ground of public policy. Lord Brougham defines public policy as "that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law." In many of its aspects the term "public policy" is but another name for public sentiment, and, as that is often transitory or shifting, it lacks the permanency upon which fixed principles of law are, or should be, based. There are, however, other phases of public policy which are as enduring and immutable as the law of gravity. One of them is that, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency, is calculated to be prejudicial to the public welfare. That sound morality and civic honesty are corner-stones of the social edifice is a truism which needs no re-enforcement by argument. It may, therefore, be taken for granted that whenever our courts are called upon to scrutinize a contract which is clearly repugnant to sound morality and civic honesty, they need not look long for the well-fitting definition of public policy, nor hesitate in its practical application to the law of contracts.'

Further discussion of the question seems unnecessary. The agreement in question clearly offends public policy, as thus defined. As it is an entire agreement, all parts of which are dependent upon an illegal consideration, it is, therefore, void and can not be enforced."

The disfavor with which an agreement for the division of fees between the attorneys for Trustees in Bankruptcy and the Receiver, or the Trustees, or the bankrupt, or the attorney of any of them, is regarded, is shown by Order XLII, General Orders in Bankruptcy, promulgated April 13, 1925 (267 U. S., 614, 615). While the division of fees between an attorney for the Trustees and an attorney for a Creditors'

Committee is not specifically enumerated in this Order, because perhaps not present at the time in the minds of the Court, nevertheless such an agreement would be subject to the same general objections, if not even greater than those that influenced this Court in adopting the above mentioned Order XLII.

In any event, while it is not contended that said Order in terms applies to the facts of this case, it clearly shows the disfavor with which this Court regards agreements by attorneys for Trustees in Bankruptcy to divide their fees. And so it may well be. As an officer of the Court, owing extraordinary loyalty to that Court, such attorney must keep himself free from any conflicting duties and obligations that could by any possibility, however remote, reduce this loyalty or affect it.

SOME ABERRATIONS OF COUNSEL FOR RESPONDENT AND THE REFEREE IN THE ARGUMENT, CONSIDERATION AND DECISION OF THIS CASE, DUE TO MISAPPREHENSION OF FACTS AND LAW.

Mr. Untermyer, in his Complaint and in his evidence, and in his Requests for Findings of Fact, emphasizes and again and again points out that he was appointed counsel for the Creditors' Committee *to conserve and preserve from disintegration* the Thompson estate, so that it could be distributed without preference, among general creditors whom he represented; that he organized the Creditors' Committee for this purpose; that he had receivers appointed by the State court for this purpose; that when the receivers were discharged he had bankruptcy proceedings initiated for this purpose; and that he collaborated with counsel for the Trustees for this purpose; and succeeded in his efforts and in obtaining large sums for distribution among the general creditors; and, therefore, that the agreement in controversy had for its purpose and intent a legitimate purpose and consideration, and was free from objection. And the Referee, in his findings on the Requests for Findings of Fact made by the plaintiff, and in his report of facts, adopts almost ver-

batim many of the Requests for Findings of Fact made by plaintiff, and in his opinion follows the same line of reasoning, and apparently holds, for those reasons, that the alleged agreement between Mr. Untermyer and Weil & Thorp was not void, as against public policy.

This line of reasoning involves an astigmatic view of the law and the facts, for the following reasons:

1st. Mr. Untermyer was employed as attorney for such unsecured creditors of Thompson as he represented, for the sole purpose of conserving and preserving the estate for distribution among general creditors.

2nd. It was his duty to his clients, by whom he was hired and paid, to do this, and he did it, as attorney for those clients, first in organizing a large majority of the creditors into a committee, and then as attorney for the Creditors' Committee in having receivers appointed by the State courts, and, when the receivers were discharged, in having Thompson adjudicated a bankrupt, and then, after trustees for the administration of the estate were appointed, in cooperating and advising with the attorneys for the Trustees in Bankruptcy; all of this for the same purposes and to accomplish the same end.

3rd. Congress in enacting, and the courts in administering, the bankruptcy law, had and have as their chief end and purpose the conservation and preservation of the estate of bankrupts and the distribution thereof among the general creditors without preference. All the arguments, findings and deductions sought to be drawn from this work of Mr. Untermyer in the conservation, preservation, and prevention of preferences, in the distribution of his estate, in any other capacity than as attorney for the Creditors' Committee, are unwarranted, because that was exactly what he was bound to do as attorney for the Creditors' Committee, or else be recreant to his trust.

4th. Mr. Untermyer and the Referee ignored the fact that there were two separate periods, in one of which Weil & Thorp properly stood to Mr. Untermyer in one relationship,

and in the other in an altogether different relationship. The first period was when, employed as attorneys for the Creditors' Committee by Mr. Untermyer, they were to act under his direction, supervision and control, and secure the adjudication in bankruptcy; and the second period was when Weil & Thorp, having completed the purposes of their employment by the Creditors' Committee, were appointed general counsel for the Trustees, and, as shown by their declaration under said Rule 5 (R. 94), ceased to represent Mr. Untermyer and his Creditors' Committee, except in so far as they represented any and all creditors as general counsel to the Trustees in Bankruptcy.

The Referee found, however, as was claimed by Mr. Untermyer, that by some agreement between Mr. Untermyer and Weil & Thorp, made after Weil & Thorp were appointed counsel to the Trustees, the agreement for the first period, with some modifications as to compensation, was continued during the second period, and that Weil & Thorp, though attorneys for the Trustees, still continued to act at the instance of Mr. Untermyer for him and for the clients represented by him, and under the domination and control of Mr. Untermyer, and subject to his direction both as to their services and as to their compensation, and this notwithstanding the fact that the Trustees and the Court were not advised and did not know of any such agreement. In other words, Mr. Untermyer contends that when the Trustees and the Court appointed and ratified Weil & Thorp as general counsel for the Trustees, while "the voice was the voice of Jacob, the hands were the hands of Esau"; that Samuel Untermyer in fact, and not Weil & Thorp, was the general counsel of the Trustees, in the dress, under the name, and speaking with the voice of Weil & Thorp.

5th. Much has been made heretofore, in argument by counsel for Respondent, of the Ninth Finding of Fact by the Referee (R. 111), which is as follows:

> "The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors who were represented by plaintiff's assignor, and

knew of defendants' connection with plaintiff's assignor in relation to such creditors."

The facts thus found are that the Trustees, when they selected Weil & Thorp as their counsel, knew that Weil & Thorp had made the application for the adjudication of Thompson in bankruptcy as attorneys for the Creditors' Committee, at that time representing and acting for their counsel, Mr. Untermyer. This was a matter of record, about which there could have been no question. The certificate and affidavit of Weil & Thorp, under Rule 5 (R. 94), showed that this representation and relationship had been terminated. This is very far, as far apart as the poles, from any finding that the Trustees knew or suspected that Weil & Thorp would continue, after their appointment as attorneys for the Trustees, notwithstanding their certification to the contrary, in the employment of and as attorneys for the Creditors' Committee, under the supervision, control and direction of Mr. Untermyer, and solely as his mouthpiece. No such finding of knowledge as the above was made or implied by the Referee by anything in this record.

THE CIRCUIT COURT OF APPEALS MISAPPREHENDED THE CONTRACT, THE LEGALITY OF WHICH WAS INVOLVED IN THE HEARING BEFORE IT, AND IN ITS DECISION AFFIRMED AN ALTOGETHER DIFFERENT CONTRACT, WHICH THE REFEREE DID NOT FIND, AND WHICH THE CIRCUIT COURT OF APPEALS, UNDER ITS OWN RULING, WAS NOT AT LIBERTY TO FIND.

The Circuit Court of Appeals misapprehended the contract set up in the pleadings and found by the Referee. It apparently affirmed an altogether different contract. That Court held that the attorneys for the Trustees could employ Mr. Untermyer to assist them, and pay him for his services out of the fees to be received by them as counsel for the Trustees. Said that Court (R. 179-180):

"• • • It is apparent that the parties to this agreement, as found, in retaining the services of the assignor of the plaintiff below, had in mind subserving

the interests of the creditors. It was to be expected that Mr. Untermyer, representing 95% of the unsecured creditors and having been in the litigation from the outset as advisor to the bankrupt, could render substantial services on behalf of the creditors and would be useful to conserving the assets out of which dividends might be paid to them. It was he who retained the defendants below. The defendants below represented no creditors or creditors' committees. They were free to accept assignment as attorneys for the trustee and to represent them. It was not unlawful for them to retain Mr. Untermyer as counsel and thus to obtain competent help in the common effort to bring to the trustees the assets of the estate. *In re Champion Wagon Co.*, 193 Fed. 1001; *In re Baber*, 119 Fed. 520; *In re Abram*, 103 Fed. 272; *In re Stotts*, 93 Fed. 438. Such an agreement is not contrary to public policy. The purpose of Rule V and of the rule of the Supreme Court was not to prevent such employment. It was designed to avoid attorneys actively searching for professional employment in bankruptcy proceedings at their inception and later obtaining their assignment as attorneys for trustees. It was an abuse which sprang from such professional conduct which gave rise to the rule. At no time was an allowance made by the court to Mr. Untermyer, who came within the provisions of Rule V if he applied to the court for compensation. As stated, the finding below is that the defendants below realized that when they were agreeing with Mr. Untermyer for his services, they were consulting counsel for the committee of creditors and knew of his connection in relation to such creditors. His services were accepted; no objection was made to them when tendered."

No fault could be found with this statement of the law. While perhaps not germane to this discussion, yet even such a contract as that found by the Circuit Court of Appeals would not be adjudicated as legal if Weil & Thorp not only employed Mr. Untermyer to assist them, but agreed substantially to abdicate as counsel for the Trustees and substitute Mr. Untermyer in their place, giving him the direction, control and supervision as such counsel; Weil & Thorp to act solely as his representatives, and to represent the interests

of his clients. As stated, even such a contract as commented upon by the Circuit Court of Appeals, with this addition, would not, it is apprehended, be approved by any court.

But the contract sued upon is not the contract discussed by the Circuit Court of Appeals. On the contrary, the contract pleaded and found by the Referee specifically states, not that Weil & Thorp, after their appointment as general counsel to the Trustees, employed Mr. Untermyer, but that Mr. Untermyer employed Weil & Thorp, and agreed with them after their appointment as general counsel to the Trustees that they were to act as his agents and for him and "the interests represented by him," and "under the direction" and "under the general supervision" of Mr. Untermyer. (R. 19, R. 106, Par. 12th.)

As showing this complete domination, control and direction under the alleged contract, it is alleged that said agreement provided that all fees received by Weil & Thorp were to be practically held for the account of Mr. Untermyer, who was to divide them between himself and Weil & Thorp, in his unfettered discretion, in such proportions as he should himself decide. (R. 19, R. 106, Par. 13th, R. 111, Par. 11th.)

The contract specifically set forth in the pleadings and found by the Referee must not be confounded with, and should not be confused with, the contract affirmed by the Circuit Court of Appeals—the not unusual case of counsel representing trustees employing other counsel to assist them, either generally or in some particular matter.

That the contract alleged in the pleadings and found by the Referee is vitally different from, and diametrically opposed to, the contract discussed by the Circuit Court of Appeals, we submit is sufficiently clear from the references heretofore made to those pleadings and findings. It becomes sun-clear and is placed beyond peradventure if those findings are read and interpreted, as they properly may be, in the light of the Referee's opinion (R. 48), to which the attention of this Court is respectfully invited for that purpose.

In that opinion the Referee first observes that the evidence of the agreement consisted of conversations between

Mr. Untermyer and Mr. Weil, and of subsequent correspondence between Mr. Untermyer and his associate, Mr. Wickwire, on the one hand, and Mr. Weil on the other hand (R. 52). He then reviews the conversations between Mr. Untermyer and Mr. Weil from the time that the former, acting in behalf of the Creditors' Committee, first employed Mr. Weil to file a petition in bankruptcy, to obtain an adjudication, and to do whatever might seem necessary in the bankruptcy proceedings to hold the estate together, until the time that Weil & Thorp were appointed chief counsel to the Trustees, *and he comes to the conclusion that those conversations evidenced no agreement or arrangement affecting any allowances that might be made to the petitioners as counsel to the Trustees* (R. 53-57).

The Referee finds the alleged contract, not on these conversations, but solely upon the subsequent correspondence. The grievous error of the Referee was in failing to limit this correspondence to the agreement for division of fees in the Frick sale, an agreement frankly made upon the consummation of the Frick sale in recognition of Mr. Untermyer's services in negotiating and all but consummating that sale prior to the bankruptcy, and which agreement was frankly disclosed to the Court in a joint petition and application for those fees, made in the name of Mr. Untermyer as well as in the names of Petitioners here and other participating counsel. (R. 58, 65, 95-96, Defendants' Proposed Findings 17, 18 and 20, as found by the Referee.) We take the findings, as perforce we must, as they are.

The Referee's view of the nature of the agreement is confirmed, if further confirmation were necessary, by his rulings upon the proposed findings submitted by the Petitioners. He refused to find that (R. 95, Defendants' Proposed Finding 15):

> "Upon the designation of the defendants as general counsel to the Trustees as aforesaid, the employment of the defendants by the said Untermyer to act under his direction for the said Creditors' Committee came to an end and terminated, and said defendants did not undertake thereafter in any manner to act for said Creditors' Committee."

and by inevitable inference he therefore found that upon the designation of the Petitioners as general counsel to the Trustees, *the employment of the Petitioners by Mr. Untermyer, to act under the latter's direction for the Creditors' Committee, continued the same as theretofore, and that the Petitioners undertook, after that appointment as well as before it, to act for the Creditors' Committee.*

The Referee further refused to find at the request of the Petitioners that (R. 95, Defendants' Proposed Finding 16):

> "At the time of the designation of the defendants as general counsel to the Trustees as aforesaid, there was no agreement or understanding between the said Untermyer and the defendants, express or implied, that the defendants were to be so designated as general counsel to the Trustees, nor was there at said time any agreement or understanding between them, express or implied, that the defendants, while general counsel to the Trustees, would act under the supervision or direction of the said Untermyer, nor was there at said time any agreement or understanding between them, express or implied, that the defendants would pay over to the said Untermyer any part of the fees to be allowed and paid to them as such general counsel."

and again by inevitable inference he therefore found that when the Petitioners were designated as general counsel to the Trustees, *there was an agreement or understanding, express or implied, between Mr. Untermyer and the Petitioners, that the Petitioners were to be so designated as general counsel to the Trustees, and that the Petitioners, while general counsel to the Trustees, and owing fealty and allegiance to them, would act under the supervision and direction of Mr. Untermyer.*

It is obvious that the Referee found that the Petitioners, though nominally designated by the Trustees as their counsel, and confirmed as such by the Court, were in reality appointed by Mr. Untermyer under an agreement whereby they acted as his employees and agents, serving him and the creditors represented by him, under his direction, supervision and control, subject to his orders, and so completely under

his domination that they were to account to him for whatever allowances might be made to them as general counsel by the Court, and he was then to exercise the prerogative of allotting to them such share of those allowances as he might see fit. Just as obviously, the agreement as found by the Referee is at the opposite pole from the agreement discussed by the Circuit Court of Appeals, whereby general counsel to the Trustees may call in the aid of an outside and qualified attorney to assist them either in a particular matter or generally.

The contract so pleaded by the plaintiff and found by the Referee was the only contract before the Circuit Court of Appeals and upon which it was required to or could pass judgment. It was not at liberty by its own ruling to make its own findings, even if so inclined. That Court delimited its jurisdiction when it said (R. 175, at 177):

> "No bill of exceptions was filed and the case is here for review on the judgment roll only. * * * On motion, the bill of exceptions was stricken out because it was not served in time. * * *. On this review we are at liberty to examine the complaint, answer, findings below and the judgment entered thereon * * *. Nor are the findings of fact a subject for our review."

POINT II.

DEFENDANTS IN THE COURT BELOW WERE NOT ESTOPPED TO PLEAD AND RELY UPON, IN BAR OF THE ACTION, THE ILLEGALITY OF THE CONTRACT PLEADED BY THE PLAINTIFF BELOW AND WHICH WAS FOUND BY THE REFEREE TO HAVE BEEN MADE.

Under ordinary circumstances one of two parties to a contract might be estopped from pleading his own wrongdoing. Such is not the case, however, where the defense is that the contract on which recovery is sought is contrary to public policy or a fraud upon the court. If two parties enter into a contract void *per se*, because contrary to public policy,

neither party thereto is estopped from raising that question. The following cases illustrate this principle:

Roberts vs. Cross, 266 Fed., 296, 301 (C. C. A., N. Y.):

> "The courts do not aid the parties to illegal agreements. If any principle of law is settled it is that a party to an illegal undertaking can not come into a court either of law or equity and ask to have his illegal contract carried out. *Ex dolo malo non oritur actio*, and *in pari delicto potior est conditio defendentis*. It makes no difference whether the contract has been executed, or remains still executory. The defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff. It was said by Lord Mansfield in *Holman vs. Johnson*, 1 Cowper, 341, 343:
>
> > "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex *turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

Among the cases cited in the opinion of the court is *Bereaux vs. Winchester Repeating Arms Co.*, 242 U. S., 191, 206, 207, 208, where this court said:

> "The position of the plaintiff that the illegality of the contract in suit can not be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel * * * [In the objection of illegality] was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law * * * It could not be overcome by defects of pleading, nor indeed,

could it by the defendant's waiver, if we may suppose that in such a matter it would be allowed."

These authorities answer the argument of the Referee that the petitioners, as parties to the contract, can not be heard to urge illegality of the contract in suit as being contrary to public policy.

"The defense of illegality may be set up, not as a protection to defendant, but as a disability to the plaintiff."

Roberts vs. Crane, supra.

The petitioners, if it were necessary in this case, would go even further, and contend that any court, regardless of the action of the parties, when the fact appeared that a contract in controversy in any suit before it was contrary to public policy, or involved a fraud upon the court, or tended to contaminate the streams of justice in its administration by the courts, would refuse its aid to the party seeking to enforce such a contract, and this, when necessary, upon its own initiative, on its own motion, whether or not that objection had been raised by either party to the controversy. Justice has been represented as holding in one hand the scales in unpoising balance, and in the other a sword; but of what use is the sword if she can not use it to defend herself against the assaults of those who would rob her of her virtue?

POINT III.

THE AGREEMENT ALLEGED IN THE COMPLAINT AND AMENDED COMPLAINT, AND PROVED BY THE EVIDENCE, WAS VAGUE, INDEFINITE AND UNCERTAIN, AND THEREFORE UNENFORCEABLE.

By the agreement as pleaded and found, Mr. Untermyer was constituted the sole judge as to the manner in which the allowances made to Wall & Thorp, as attorneys for the Trustee in Bankruptcy, should be apportioned between

them and himself. There is no finding in the record that Mr. Untermyer's determination that sixty per cent. of such allowances might be retained by Weil & Thorp and that forty per cent. thereof should be paid to him, was a fair and equitable distribution. There is no finding that the services rendered by Mr. Untermyer and his firm justified a compensation to them of forty per cent. of such allowances. As far as appears from the record, Mr. Untermyer's determination was arbitrary and unreasonable. The Circuit Court of Appeals, in sustaining the agreement, said (R. 182):

> "Allowing Mr. Untermyer to determine what was fair and equitable did not make the agreement vague or indefinite. His judgment was to prevail, but it could not be arbitrary or capricious; it was to be fair and equitable."

There is no finding, however, in this record, that the determination of Mr. Untermyer was fair and equitable. On the contrary, the Referee declined to find this, when requested by the plaintiff in the District Court below. The Referee's finding implies the contrary.

The plaintiff in the District Court below, in his proposed Thirteenth Finding of Fact, asked the Referee to find that the determination was made in good faith and was fair and reasonable, and that the division was in all respects reasonable and equitable and commensurate with the relative services rendered by Weil & Thorp and by Mr. Untermyer and his firm, but the Referee specifically refused so to find. The proposed Thirteenth Finding and the Finding itself are as follows (R. [illegible]):

> "13. On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 29, 1930, the plaintiff's assignee on or about November 15, 1930, pursuant to the aforesaid agreement [and after giving due consideration to the nature and character of the services rendered by the defendants and by himself and by the firm of Guggenheimer, Untermyer & Marshall, acting for him, in the aforesaid bankruptcy proceedings] determined [in good faith that a fair and reasonable] division of the sum of $117,650.00

theretofore received by the defendants as aforesaid, was that the defendants should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision, [which were in all respects reasonable and equitable and commensurate with the relative services rendered as aforesaid].

Found omitting portions in brackets which are not found. A. W."

It is difficult to understand, therefore, upon what evidence or findings the Circuit Court of Appeals arrived at the conclusion that the determination made by Mr. Untermyer was fair and equitable, as no such finding by the Referee had been made; so that, upon the statement of the law made by said Court the contract should have been declared unenforceable.

The courts of New York, where this alleged agreement is claimed to have been made, and where this action was brought, have held that agreements of the kind pleaded and found herein are vague, indefinite and unenforceable.

Varney vs. Ditmars, 217 N. Y., 223;
United Press vs. New York Press Co., 164 N.Y., 406;
Barker vs. O'Grady, 163 N. Y. Supp., 594;
McDonald vs. Acker, Merrall & Condit Co., 192 App. Div., 123;
Canet vs. Smith, 173 App. Div., 241;
Featherstone vs. Fowler, 174 App. Div., 452;
Bluemmer vs. Garvin, 120 App. Div., 29.

There is no general rule applicable alike to all cases. Each case stands upon its own peculiar facts. The contract in controversy here would seem to come within the prohibited class. But there is no doubt, under any and all of the decisions, that it must be shown that the decision by any party authorized to decide must not be capricious or arbitrary, but must be reasonable and equitable, and unless those facts appear then the particular case stands as if no distribution had been made or attempted. Wherefore, under the findings

of the Referee, the plaintiff has not shown his right to recover.

For the foregoing reasons Petitioners respectfully submit that the decision of the United States Circuit Court of Appeals for the Second Circuit (S. D., N. Y.), rendered December 19, 1927, affirming a judgment of the District Court of the United States for the Southern District of New York, entered by that Court on March 15, 1926, against Petitioners and in favor of Respondent, should be reversed, and that said District Court should be directed, upon the record before this Court, to enter judgment in favor of Petitioners, with proper costs.

Respectfully submitted,

A. Leo. Weil,
In Propria Persona, and as Counsel for Petitioners.

J. G. Milburn, Jr.,
Of Carter, Ledyard & Milburn,

Louis Salant,
Of Stein & Salant,
Of Counsel.

Office Supreme Court, U. S.
FILED
FEB 28 1928
WILLIAM R. STANSBURY, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. [redacted] 59

A. LEO. WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. HEARY, RESPONDENT.

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION TO THIS COURT FOR CERTIORARI.

A. LEO. WEIL,
In Propria Persona and as Counsel for Petitioners.

(33,188)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 736.

A. LEO. WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY, RESPONDENT.

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION TO THIS COURT FOR CERTIORARI.

I.

How Far Is the Determination of the Referee Reviewable?

Respondent, pages 8 to 12, inclusive, argues that the agreement of reference made the Referee an arbitrator, "whose determination is not reviewable."

Motion to dismiss the appeal on this ground was made in the Circuit Court of Appeals. Said that Court:

> "* * * The application to dismiss is now renewed and is denied. On this review we are at

liberty to examine the complaint, answer, findings below and the judgment entered thereon. No stipulation was signed waiving a jury as provided by Section 649 of the Revised Statutes. Therefore, by virtue of Sec. 700 of the Revised Statutes, the defendant below is not accorded a right to review the rulings on the law of the court, during the progress of the trial of the cause. Nor are the findings of fact a subject for our review. *Fleischmann Co. vs. United States*, 270 U. S., 349; *Duigan vs. United States*, 274 U. S., 195; *Law vs. United States*, 266 U. S., 494. In the *Duigan case, supra*, in referring to Secs. 649 and 700 of the Revised Statutes, the court, referring to Sec. 649, said:

> "Its purpose and effect, when read together with Sections 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or of the sufficiency of a special finding to support the judgment."
>
> (Opinion, Circuit Court of Appeals, Transcript of Record, p. 265.)

It will be observed that that Court held, as this Court had decided, that the Court on review can decide, as a matter of law, if the wrong judgment was entered on "the complaint, answer, and findings below."

This is the sole question submitted to this Court by these petitioners in their application for writ of *certiorari*.

II.

The Contract According to Plaintiff's Own Formal and Deliberate Statement.

Respondent states, page 2 of his brief: "The petition does not set forth the findings of the Referee, but consists of a statement largely garbled," and then proceeds to quote (pages 3 to 7, inclusive, of his brief) from the Referee's findings of fact.

The Referee found that Mr. Untermyer and Guggenheimer, Untermyer & Marshall rendered certain services to this estate. By so doing they did nothing more than was required of them, as attorneys for the Creditors' Committee, representing a large majority of the creditors.

Petitioners, in their petition, pages 7 to 13, set forth, in the words of the complaint, the contract on which the suit was brought by plaintiff, and on which the same was tried before the Referee. This contract is set forth in the petition for writ of *certiorari* verbatim in the words of the complaint and amended complaint filed by the plaintiff himself in the court below. This contract, thus stated, must control. The Referee was bound thereby. He stated (R., folio 697, p. 2324):

> "The Referee has come to the conclusion that a contract substantially as alleged by the plaintiff did exist."
>
> (Transcript of Record, p. 86.)

It would serve no useful purpose to discuss different contracts that might be assumed from other findings made by the Referee. If the contract specifically set up

by plaintiff himself, in the complaint and amended complaint, on which this suit was tried, and under which the evidence was introduced, and which the Referee found was made, is contrary to public policy, illegal and void, the plaintiff can not recover. This contract is then stated in paragraph 11, page 15, of the petition for writ of *certiorari* to this Court:

> "11. Your petitioners thus have shown that Mr. Untermyer, although not appointed by the trustees as counsel, nor ratified nor confirmed by the court, as by Rule 5 of said court required, by his own allegations entered into an agreement with Weil & Thorp, as general counsel of the trustees, whereby said duly appointed counsel were required to proceed 'under the general supervision of plaintiff's assignee' (R., folios 21, 109, pp. 7, 33; Appendix, pp. 3, 23, —), were required to act 'for plaintiff's assignee and the interests represented by him' (R., folio 94, p. 32; Appendix, p. 22), and were required to pay to Mr. Untermyer such part of the fees allowed by the court in bankruptcy as Mr. Untermyer himself should demand."

It is wholly immaterial that from other findings of the Referee another or different contract could be assumed, which might or might not be so clearly contrary to public policy, illegal and void, and which a Court, depending upon the degree of its sensitiveness to attacks upon the administration of justice, might or might not condemn.

Respectfully submitted,

A. LEO WEIL,
In Propria Persona and as
Counsel for Petitioners.

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A written stipulation referring case to a Referee meets the requirements of Section 649 and Section 700 R. S. (U. S. Code, Title 28, Sections 773 and 875) 4-5

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 59

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of WEIL & THORP, *Petitioners*,

vs.

EDWARD M. NEARY, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT

This Brief in Reply will be confined to matters strictly in reply. In striving for brevity, effectiveness may be sacrificed at times by failure to quote from the record and from the authorities, but instead merely referring thereto.

Bottom of page 1, Respondent's brief, he states:

> "The Referee rendered decision in favor of Respondent, his findings of fact and conclusions of law being set forth in full at pages 2 to 6 *infra*."

No conclusions of law at all are set forth. Page after page of findings, both of fact and of law, in answer to the requests for such findings by both Petitioners and Respondent, are not set forth. Many of these findings, not so set forth, are referred to in the argument and quoted in other portions of the brief of Respondent.

Top of page 2, Respondent's brief, in italics, is the statement:

> "No bill of exceptions was allowed, signed or filed."

This immediately followed the sentence (bottom page 1):

> "A motion was made for the confirmation of this report before Judge Goddard in the United States District Court for the Southern District of New York and resulted in a decision affirming the report, and thereafter judgment was rendered in conformity therewith."

Over thirty pages of exceptions (R. 114-144) were taken. The order of Judge Goddard granting motion to confirm (R. 144-145) states:

> "Now on reading and filing the notice of motion to confirm the said report and the judgment thereon * * * and the defendants' exceptions to the Referee's opinion as submitted prior to the rendition of his report, * * * the defendants' exceptions to the report of the Referee, to his allowance of the proposed findings of fact and conclusions of law submitted by the plaintiff, and to his refusals to find the proposed findings of fact and conclusions of law submitted by the defendants, * * * it is ordered," etc.

The opinion of the Circuit Court of Appeals (R. 175 at 177) shows that a bill of exceptions had been filed by defendants but "on motion the bill of exceptions was stricken out because not served in time."

This same statement about no bill of exceptions having been filed is repeated several times in the brief of Respondent. This Court is warned against being misled by these statements into assuming that defendants acquiesced in these findings of fact and of law. The only reason why the bill of exceptions was not considered and passed upon by the District Court was that the judgment, under the practice of that Court, was entered on the Referee's report *pro forma*, and the reason why the bill of exceptions was not insisted upon and argued in the Circuit Court of Appeals was that on motion of the Respondent this bill of exceptions was stricken out because it had not been served in time.

At the bottom of page 6 of the brief of Respondent is the statement:

> "In the presentation of the Respondent's argument it will be contended:
>
> (1) That the stipulation and order on which the reference to Mr. Wardwell was based made him an arbitrator whose determination is not reviewable.
>
> (2) In the event that this proposition is not sustained we next contend that if in the state of the record there is anything that may be reviewed, it must be limited to a consideration of the proposition as to whether the findings contained in the report of the Referee justify the conclusions of law awarding judgment."

Then, under Point I, pages 7 to 20, inclusive, there are cited a very large number of cases, which upon care-

ful analysis could be shown do not sustain the contention of Respondent that the reference made Mr. Wardwell a common-law arbitrator, the proceedings non-judicial, and that nothing could be reviewed, not even whether the pleadings sustained the judgment.

This same question was raised before this Court on the application for certiorari, and in the Circuit Court of Appeals, and in both courts Respondent made elaborate arguments thereon, and was overruled in both courts.

The answer to these contentions, argued again at great length in the Brief for Respondent, covering over forty pages, can be simplified by dividing the answer into three propositions, and by showing that in the state of the record Petitioners are not interested in the first or the second of these answers, but only in the third. These propositions are as follows:

First. It has been held by many courts that a written stipulation, such as that signed by the parties in this case, "agreeing that the trial of this cause be and the same hereby is referred to Allen Wardwell as Referee to hear, try and determine the same with all the powers to act and rule upon said trial possessed by the court," meets the requirements of Section 649 R. S. (U. S. Code, Title 28, Sec. 773), and is a waiver in writing and permits review under Section 700 R. S. (U. S. Code, Title 28, Sec. 875), that being the inevitable and necessary effect of such a stipulation, even though the words "trial by jury being hereby waived" are omitted, and that the agreement could have had no other purpose or intent than such waiver.

Baugher vs. Ins. Co., 103 U. S. 90 (1880).
Ch. J. Waite.

United States vs. Harris, 106 U. S., 629 (1882). Woods, J.

Bond vs. Dustin, 112 U. S., 604 (1884). Gray, J.

Bamberger vs. Terry, 103 U. S., 40 (1880). Ch. J. Waite.

Supervisors vs. Kennicott, 103 U. S., 554 (1880). Ch. J. Waite.

City of Cleveland vs. Walsh Constr. Co., 279 Fed., 57 (1922), C. C. A., 6th Circ.

Second. Where a jury trial has not been waived in accordance with the provisions of the Act of Congress, nevertheless, the court, on review, can consider the questions of law presented by the record; that is, the process, pleadings and judgment, *and whether or not the special findings of the referee or arbitrator are sufficient to sustain the judgment.*

David Lupton's Sons vs. Automobile Club of America, 225 U. S., 489 (1912). Mr. Justice Hughes.

Shipman vs. Straitsville Mining Co., 158 U. S., 356 (1895). Mr. Justice Brown.

Paine vs. Central Vt. R. R. Co., 118 U. S., 152 (1886).

Andes vs. Slauson, 130 U. S., 435 (1889). Mr. Justice Gray.

Roberts vs. Benjamin, 124 U. S., 64 (1887) (N. Y.)

Fifth Nat. Bank of City of New York vs. Luttle, 250 Fed., 361 (1918), C. C. A., 2nd Circ.

Demotte vs. Whybrow, 263 Fed., 366 (1920). (C. C. A., 2nd Circ.)

Steger vs. Orth, 258 Fed., 619 (1919). (C. C. A., 2nd Circ.)

J. G. White & Co. vs. Ball Engineering Co., 223 Fed., 618 (1915). (C. C. A., 2nd Circ.)

Delaware, L. & W. R. Co. vs. Caboni, 223 Fed., 631 (1915). (C. C. A., 2nd Circ.)

Municipal Excavator Co. vs. Siedhoff, 15 Fed., (2nd) 10 (1926).

Edwards vs. La Dow, 230 Fed., 378 (1916).

Iroustam vs. All Russian, etc., Societies, 270 Fed., 460 (1920).

Ford vs. U. S., 260 Fed., 657 (1919).

This proposition has been sustained by numerous authorities, some of which have been cited, and is apparently conceded by Respondent in his brief, top of page 7, which states the review "must be limited to a consideration of the proposition as to *whether the findings contained in the report of the referee justify the conclusions of law awarding judgment*," to which proposition he cites many cases.

Third. Where a jury trial has not been waived, in accordance with Secs. 649 and 700 R. S. (U. S. Code, Title 28, Secs. 773 and 875), the power of the court to review is "limited to a consideration of such questions of law as may have been presented by the record proper *independently of the special finding*, such as whether the pleadings were sufficient to support the judgment."

When waiver of jury is not in writing in accordance with Secs. 649 and 700 R. S. (U. S. Code, Title 28, Secs. 773 and 875), nevertheless appellate courts may review errors arising on process, pleadings and judgment.

Flanders vs. Tweed, 9 Wall., 425 (1869). Nelson, J.

Bond vs. Dustin, 112 U. S., 604 (1884). Gray, J.

Commissioners of Road Improvements District No. 2 vs. St. Louis S. W. Ry. Co., 257 U. S., 547. Taft, C. J.

Spalding vs. Manasse, 131 U. S., 65 (1889).

Twist vs. Prairie Oil & Gas Co., 274 U. S., 684 (1926). Brandeis, J.

Campbell vs. U. S., 224 U. S., 99 (1912). Van Devanter, J.

Campbell vs. Boyreau, 21 How., 223 (1858).

Fleishman Constr. Co. vs. U. S., 270 U. S., 349 (1925). Sanford, J.

City of Cleveland vs. Walsh Constr. Co., 279 Fed., 57 (1922). C. C. A., 6th Circ.

Municipal Excavator Co. vs. Siedhoff, 15 Fed., (2d), 10 (1926).

J. G. White & Co. vs. Ball Engineering Co., 223 Fed., 618. (C. C. A., 2nd Circ. [Conn.])

Rush vs. Newman, 58 Fed., 158 (1893).

Noone vs. Sinner, 24 Fed. (2d), 960 (1928).

Ladd & Tilton Bank vs. Lewis A. Hicks Co., 218 Fed., 310 (1914).

Ford vs. U. S., 260 Fed., 657 (1919).

Bouldin vs. Alto Mines Co., 299 Fed., 301 (1924).

Graver Corp. vs. Hercules Gasoline Co., 16 Fed. (2d), 459 (1927).

United States vs. McGovern, 299 Fed., 302 (1924).

Erkel vs. U. S., 169 Fed., 623 (1909).

James Dickinson Farm Mortgage Co. vs. Scimer, 12 Fed., (2d), 772.

Illinois Surety Co. vs. U. S., 229 Fed., 527 (1916).

There is a conflict of authority as to whether the written reference alone, without the specific waiver of trial by jury, is a sufficient waiver of the trial by jury under the Acts of Congress to make Section 700 R. S. (U. S. Code, Title 28, Sec. 875) applicable. The weight of authority and of reason and logic would seem to be that such waiver of trial by jury was implied, as otherwise the written reference would be ineffectual, and such waiver of trial by jury must have been intended by the parties. But Petitioners will not argue this proposition, for the reasons hereinafter explained.

In answer to the contention of Respondent that the Referee in this case was an arbitrator under the common law and his findings cannot be reviewed and on our second proposition it must be noted: This case was brought in the State court and removed to the Federal court. The pleadings were filed in court. Then the submission was made by stipulation to Mr. Ward well "as referee to hear, try and determine the same with all the powers to act and rule upon said trial possessed by the court."

There were filed in court:

(a) The Referee's opinion;

(b) Defendants' exceptions to Referee's proposed report;

(c) Defendants' proposed findings of fact and conclusions of law and Referee's answers thereto;

(d) Plaintiff's proposed findings of fact and conclusions of law and Referee's answers thereto;

(e) Report of Referee, with Referee's findings of fact and conclusions of law; and

(f) Defendants' exceptions.

Thereupon the Court made an order (R. 144) confirming the report, and, in granting the motion to confirm said report and for judgment in accordance therewith, recited that the motion was brought on for hearing before the court, and upon reading,—"the report of the Referee, dated January 13, 1926, the opinion rendered by him, the pleadings, including the amended pleadings herein, and all of the proceedings theretofore had in this case in support of the motion, and the defendants having submitted the order removing this case from the Supreme Court of the State of New York to this Court, the order substituting Messrs. Stein & Salant as attorneys for the defendants, the stenographer's minutes of the testimony taken before the Referee and the exhibits offered in evidence on the hearing before him, the defendants' exceptions to the Referee's opinion as submitted prior to the rendition of his report, the request made to the Referee by the respective parties to pass upon proposed findings of fact and conclusions of law and the findings made thereon, the defendants' exceptions to the report of the Referee, to his allowance of the proposed findings of fact and conclusions of law submitted by the plaintiff, and to his refusal to find the proposed findings of fact and conclusions of law submitted by the defendants, and after hearing Louis Marshall, Esq., of counsel for the plaintiff, in support of the said motion, and Louis Salant, Esq., of counsel for the defendants, in opposition thereto, upon motion of Guggenheimer, Untermyer & Marshall, the attorneys for the plaintiff, it is ordered, that said motion to confirm the report of the referee be and the same is in all respects granted and that a judgment be entered herein in conformity with the said report in favor of the plaintiff and as against the defendants for the sum of $57,064, with interest thereon from November 15, 1920,

and for the costs and disbursements of this action, including the Referee's fees and stenographer's minutes."

By these proceedings the court adopted the report and findings of the Referee, confirmed the same as its own action and entered judgment thereon, as the action of the court.

This is a sufficient answer to the contention of the Respondent that this was a common-law arbitration, a non-judicial proceeding, of which no review could be had of any kind or character.

There is still another answer to this contention of the Respondent, namely:

THE RULE OF REFERENCE IN THIS CASE WAS HAD UNDER THE NEW YORK CODE (CIVIL PRACTICE ACT, SECTIONS 461-471), AND THE PRACTICE UNDER THAT ACT WAS FOLLOWED IN EVERY PARTICULAR.

The right of the Federal Court to make a reference under the State practice has long been recognized by this Court, the New York Federal Courts, and every other Federal Court where such State practice prevails, it being held to be strictly within the Conformity Acts (Sec. 914 R. S.; U. S. Code, Title 28, Sec. 724) of Congress.

Newcomb vs. Wood, 97 U. S., 581 (1878), at page 583.

David Lupton's Sons vs. Automobile Club of America, 225 U. S., 489 (1912). Mr. Justice Hughes.

Shipman vs. Straitsville Mining Co., 158 U. S., 356 (1895), at page 361. Mr. Justice Brown.

Parker vs. Ogdensburgh & L. C. R. Co., 79 Fed., 817 (C. C. A., 2nd Circ.).

Fifth Nat. Bank of City of New York vs. Lyttle, 250 Fed., 316 (1918).

City of Cleveland vs. Walsh Construction Co., 279 Fed., 57 (1912). (C. C. A., 6th Circ.)

DeMotte vs. Whybrow, 263 Fed., 366 (1920). (C. C. A., 2nd Circ.)

In this case Rogers, J., at page 367 stated:

"The facts found by the Referee when confirmed by the Court are treated as the finding of the court."

Steger vs. Orth, 258 Fed., 619 (C. C. A., 2nd Circ.) (1919).

The Court said, (p. 620):

"The action is at law, and as soon as issue was joined the case was referred to a referee 'to hear and determine,' by an order duly entered in the court below on the written consent of the parties. This method of trial needs no explanation to a practitioner under the New York Code of Civil Procedure.

• • • •

The question of adjusting trials before consent referees (common in many States of the Union), not only with R. S. § 914 (Comp. Stat. § 1537), and R. S. §§ 649 and 700 (Comp. Stat. §§ 1587, 1668), but also with the legislation creating and regulating the Circuit Courts of Appeal, is not new. The Fourth Circuit, in *Swift vs. Jones*, 145 Fed., 489, 76 C. C. A., 253, held that such method of trial was or ought to be unknown to the federal court;

but in *Tiernan vs. Chicago Life, etc., Co.*, 214 Fed., 241, 131 C. C. A., 284, and *Philadelphia, etc. Co. vs. Feehheimer*, 220 Fed., 408, 136 C. C. A., 25, Ann. Cas. 1917D, 64, the Eighth and Sixth Circuits substantially held that, if the court approved or adopted the findings and conclusions of the referee, a judgment so obtained and entered was subject to review in the same manner as are judgments founded upon findings by the judge after trial of a common-law action with jury duly waived in writing.

This opinion and the practice resulting therefrom has long obtained in this circuit. * * *."

No conflict of authority exists, that where such proceedings have been had upon a reference, as were taken in this case, which made such proceedings the action of the Court, as to the right of the Court, on review, *to at least consider* the record proper, whether the pleadings are sufficient to support the judgment, without reference to the special findings of the Referee, even if made or adopted by the Court.

In this case, on account of the record, counsel are relieved from any discussion or argument on the first two propositions, and can rely on the third. The action of the Circuit Court of Appeals, on motion of the Respondent, in striking out the bill of exceptions of Petitioners, because it had not been served in time, prevented Petitioners in that court and in this Court from discussing the sufficiency of the evidence to justify the same, or any of the questions of law occurring during the trial.

Therefore, it would serve no useful purpose, so far as Petitioners are concerned, to contend in this Court

that the filing of the written submission to the Referee was a sufficient waiver of trial by jury to comply with the statutes.

The second proposition, as to whether or not the sufficiency of the special findings of the Referee can be considered by this Court on the questions now before this Court, is of no importance to the Petitioners. As will be observed from their argument (Brief for Petitioners, pp. 8-11), they have planted themselves squarely on the pleadings. They have argued that the pleadings are not sufficient to support the judgment, because the alleged contract *as set up in the Complaint*, as interpreted and applied by the Referee, is contrary to public policy, illegal and void.

In the state of the record in this case, the Petitioners plant themselves upon the undisputed proposition, on which there is no conflict of authority whatever, that a court of review may, and on application must, consider all questions of law presented by the record proper, independently of special findings such as whether the pleadings were sufficient to support the judgment.

Where the complaint, upon its face, sets up a contract clearly contrary to public policy, to hold that the court of review is not bound so to hold, is to make of the administration of justice not only "a delusion and a snare" but a shameless pretence.

Suppose, for example, the Complaint had set up a contract made by Mr. Untermyer with Mr. Weil during the late war, and that Mr. Weil had agreed with Mr. Untermyer, as the representative of the German Government, that Mr. Weil was to secure information as

to contracts for war munitions and as to the dates of shipment, and of the sailings of troops, &c., so that Mr. Untermyer could communicate the same to the German Government to enable them to intercept and destroy the same, and Mr. Untermyer had agreed to pay Mr. Weil for his services one-half of what he, Mr. Untermyer, secured from the German Government for obtaining this information, and suit had been brought on this contract by Mr. Weil for the recovery of his half, and this suit had been referred to a Referee who had found such a contract and the amount due to Weil under said contract, and the Court had confirmed and adopted this findings as its action and had accordingly entered judgment for said amount; on review in this Court, would it be contended that this Court would have to sustain that judgment, and would be prevented from denouncing that contract? This illustration is not so fanciful. Contracts such as that in controversy, in the opinion of counsel for Petitioners, are pregnant with nearly if not quite as much evil to our institutions as the traitorous contract above given.

The Complaint sets up that Mr. Untermyer, as the attorney for the Creditors' Committee, agreed with the defendants, as general counsel of the trustees in bankruptcy, that Mr. Untermyer "and the firm of lawyers with which he was associated should collaborate with the defendants *under the direction of the former* [Mr. Untermyer] in the performance of such services and that the defendants were to receive for the services rendered by them out of such allowance as should eventually be made by the court in payment for such services as they should render in said bankruptcy proceedings such sum as plaintiff's assignor [Mr. Untermyer] considered just and equitable, the remainder of the amount so allowed being payable to him." (R. 19.)

"Pursuant to such arrangements the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision of plaintiff's assignor [Mr. Untermyer] and with the active aid of the latter and of the firm with which he was associated, for which allowances were made to the defendants" by the court.

There is no allegation in the Complaint that this agreement was brought to the knowledge of the trustees or the court, who made and confirmed the appointment of such counsel to the trustees.

The Referee in his opinion says (R. 71):

> "The only objection that I can see to the contract was that it does not seem in terms to have been made known to the court or to the Referee."
>
> (Referring to the Referee in Bankruptcy.)

Divested of legal phraseology Mr. Untermyer claims that as attorney for creditors, representing interests that were or might become adverse to the bankrupt estate, he made an agreement with the attorneys for trustees in bankruptcy whose selection had been confirmed by the Court, and who therefore as officers of the court, like the trustees or the Referee or the judge himself, owed the highest obligation of trust and allegiance to the estate represented by them, whereby instead of acting solely and uncontrolled and unhampered in the interest of said estate, said attorneys for the trustees were first to collaborate with Mr. Untermyer and then second act under his direction and, then third were to turn over to Mr. Untermyer all allowances made by the court to them for services as attorneys for the trustees, he to give them out of the same such amount as he chose and keep for himself the

rest, and that pursuant to said arrangement the attorneys for the trustees did actually act under the general supervision of Mr. Untermyer and with his active aid and that of his firm and received the allowances out of which he now claims 40 per cent. All this unknown to trustees or Court. This contract as thus set forth is without exceptions, and must regulate the relations of said parties, even if Mr. Untermyer sued the trustees to collect claims for his creditors (which he did) or took other hostile attitude to the trustees or to the estate, whether in the sale of property, contesting of claims represented by him, or howsoever. In other words, however hostile should become the interests represented by Mr. Untermyer to the trustees or the estate this agreement was to continue. If the trustees had made such a contract, or the Referee, the bar, the public, the Courts would have held up their hands in holy horror. Their relation to the estate was no less confidential than these other officers of the court, the trustees' attorneys. Yet a Referee has reported that such a contract was not contrary to public policy and a Court has confirmed that report and entered judgment thereon. It is now argued in this Court that this Court is bound to ratify and confirm this action of Referee and of Court and give the sanction of its authority to such a contract.

The monstrous character of such an agreement and its pregnancy for evil has been discussed in Petitioners' brief, p. 12-14, and 16, 17.

Where this agreement appears in all its shamelessness on the face of the Complaint, as the sole ground for recovery, it would seem a work of supererogation to argue that this Court, on the review of this case, has power to denounce the same as contrary to public policy.

It may occur to the inquiring mind: If this contract set up in the Complaint was so clearly against public policy, why was it not demurred to? The Amended Complaint was not filed until after the trial had ended, after all the testimony had been taken, and was made on the motion of plaintiff to make the Complaint conform to the proofs. It might be imagined as another reason, that defendants were confident that upon the evidence which had been taken a finding would be made that they had never made such a nefarious contract, and that they were reluctant to admit, even for the purposes of a demurrer, that they had ever made such a contract as was set up in the Complaint. In any event, the fact that no demurrer was filed *then* does not prevent this Court *now* from deciding the question.

At the bottom of page 20 of the Brief for Respondent is the statement:

> "The correctness of the Referee's Findings of Fact above quoted *in extenso* can not be challenged. They were made by a lawyer of great ability, vast experience and unquestioned fairness and integrity, than whom there is nobody at our bar possessed of higher ethical standards or a finer conception of professional ethics."

Is this the only reason they can not be challenged? The greatest judges in this and every other country, possessing all of these virtues, have had their findings of fact and decisions challenged. The statement above quoted, without anything in the record to justify it, by an abuse of opportunity was injected into Respondent's brief. Whenever counsel, in argument, to sustain the decision of any court, find it necessary to proclaim the great ability, experience, fairness, integrity, possession of ethical standards and conceptions of professional

ethics of that court, it is only when there is something abnormal, extraordinary and indefensible in that decision, calling for such an explanation and requiring justification otherwise than by argument.

Throughout the brief of Respondent, as on pages 21, 49, etc., the statement is made:

> "The findings of the Referee show that nothing was concealed from the trustees in bankruptcy, for it is found at folio 168, page 111, that the latter 'in selecting the defendants as their counsel realized that they were selecting for the position counsel of the committee of creditors, who were represented by plaintiff's assignor, and knew of the defendants' connection with the plaintiff's assignor in relation to such creditors.'"

This Court must not be misled by such statements. This is an attempt to confuse two periods of time, the first of which was when Petitioners were employed by the Creditors' Committee and represented them under the supervision of Mr. Untermyer, to secure the adjudication in bankruptcy of Mr. Thompson and meanwhile prevent foreclosure of mortgages, sales on judgments, &c. The second period was when this employment had ended and was after the trustees were appointed and Petitioners were selected as their counsel. Under the rule of the Bankruptcy Court they had to certify that they had no further connection with Mr. Untermyer or creditors.

There is no finding by the Referee, and it is not the fact, that either the trustees or the court knew of any connection between Mr. Untermyer and their attorneys, after their appointment as attorneys for the trustees, such as that set up in the alleged contract. The

Referee in his opinion (R. 71), hereinbefore quoted, states the contrary.

On page 24 of the Brief for Respondent, the proposition is made:

> (a) "The burden of proof to show that an agreement is illegal or against public policy rests upon the defendant. The principle *ut res magis valeat quam pereat* applies with full force in such a case."

In support and discussion thereof follow 25 pages of argument and citations.

This burden of proof and application of the legal maxim apply where the invalidity does not appear upon the face of the contract, and where the possible injury to the public showing that it is contrary to public policy depends upon other facts and circumstances (which must be proven) than those disclosed by the contract **itself**. Another exception is where the contract on its face shows that it has a tendency to evilly affect the administration of justice and pollute its streams.

In the first case cited on page 24 of Respondent's brief,—*Dykers vs. Townsend*, 24 N. Y., 57, a case involving the Stock Jobbing Act,—the Court said:

> "*Where a contract is apparently valid upon its face*, the party seeking to impeach it must prove that it was made under such circumstances or for such purpose as to render it void before the defense can be made available."

In all of the cases cited by Respondent the contract was apparently valid upon its face and required proof to show that it was against public policy as al-

leged, and the quotations from the respective courts are explained by these conditions. A brief review of these cases shows this.

Ormes vs. Dauchy, 82 N. Y., 443, concerned a contract to advertise a lottery in other states, where there was nothing to show that lotteries were illegal in such other states.

Richards vs. Weiner Co., 207 N. Y., 59, was an action on a contract by a corporation to purchase its own stock.

Appleton Co. vs. Warbasse, 92 Misc. Reps., 42, was an action to recover expenses incurred in an action of libel.

Oregon Railroad & Nav. Co. vs. Dumas, 181 Fed., 781, was an action to recover damages for failure to supply cars for the transportation of plaintiff's apple crop.

People ex rel. N. Y. C. & H. R. R. Co. vs. Walsh, 211 N. Y., 90, was on a contract between a railroad company and the State to provide for a permanent easement to occupy canal lands for railroad purposes.

Hobbs vs. McLean, 117 U. S., 567, was an action between partners for an accounting, involving a settlement of profits and losses under a contract with the Government.

A number of other cases are cited and quoted from, in none of which did the contract upon its face show that it was contrary to public policy.

On page 30, Brief of Respondent, it is stated, "Petitioners rely on three cases," and the Respondent then

proceeds to discuss these cases and give the facts thereof. By reference to page 15 *et seq.* of Petitioners' brief, it will be found that the cases relied on and cited by Petitioners include four cases decided by the United States Supreme Court and four cases decided by the Supreme Courts of States and one case by the Circuit Court of Appeals. This latter case was taken to the Supreme Court, *Sampliner vs. Motion Picture Co.*, 254 U. S., 233, and reversed upon a question of practice, without any opinion on the citations made in petitioner's brief, and the case was remanded for further proceedings in the District Court in conformity with the opinion of the Supreme Court on the questions of practice alone.

But a proposition so elementary would seem to require the citation of no authorities. The authorities are cited by Petitioners more for the purpose of showing that the law denounces such contracts in order to close the door to temptation, where the general tendency might lead to wrong-doing, even when no wrong was intended or shown.

A discussion from time to time in the Brief of Respondent of the fact that nothing illegal was shown to have been done by Petitioners under this contract, while not relevant to this discussion, may be easily explained by the fact that Petitioners most vehemently denied in their answers that they ever made such a contract or acted under the same.

The statement is made on page 45 of the Brief for Respondent that the Petitioners—

> "likewise had the benefit of the exceptional familiarity with the bankrupt estate, the experience and advice of plaintiff's assignor and of his knowledge

of the negotiations conducted by the Creditors' Committee for the advantageous sale of the bankrupt's assets for the benefit of his creditors. Indeed, it was these negotiations which finally culminated in the conveyance by the trustees of the bankrupt's property to the great advantage of the creditors."

Neither the Creditors' Committee nor Mr. Untermyer found the purchaser, the Piedmont Coal Company, to which the bulk of the bankrupt's estate was sold and conveyed. This was done by the trustees and their attorneys. But even if he had, he was the attorney of the Creditors' Committee, and was paid by them for his services.

But all of this statement in Respondent's brief is outside of the record before this Court, and like other statements heretofore referred to, and many that have not been mentioned, are improperly injected into the Brief for Respondent.

On page 56 of Brief for Respondent, it is stated:

"Petitioners for the first time have raised a question which was not presented in the petition or brief on the application for writ of *certiorari* herein, namely, that the Referee in passing on Respondent's thirteenth request to find (Rec. p. 106) omitted to find those portions of the request which are printed in brackets and that such portions were not found," etc.

It will be found by reference to bottom of page 18 and on page 19 of Petitioners' brief, on the application to the Supreme Court for writ of *certiorari*, that this

question was there squarely and specifically raised and presented.

Respectfully submitted,

A. Leo. Weil,
In Propria Persona,
and as Counsel for Petitioners,
721 Frick Building,
Pittsburgh, Pa.

J. G. Milburn, Jr.,
Of Carter, Ledyard & Milburn,
54 Wall St., New York, N. Y.

Louis Salant,
Of Stein & Salant,
Marbridge Bldg., New York, N. Y.
Of Counsel.